No. 11040.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOOPER C. DUNBAR, GORDON B. MORRIS and CRAIG C. HORTON, Trustees of Bell View Oil Syndicate, a trust,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
MAURICE P. WOLK,
Special Assistants to the Attorney General.

CHARLES H. CARR,
United States Attorney.
E. H. MITCHELL,
GEORGE M. BRYANT,
Assistant United States Attorneys
EUGENE HARPOLE,
Special Attorney
Bureau of Internal Revenue.
United States Postoffice and
Courthouse Bldg., Los Angeles (12),

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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No. 11049.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOOPER C. DUNBAR, GORDON B. MORRIS and CRAIG C. HORTON, Trustees of Bell View Oil Syndicate, a trust,

Appellees.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The District Court rendered no opinion. The findings of fact and conclusions of law [R. 67-72 are not reported.

Jurisdiction.

This appeal involves federal unemployment taxes for the years 1936 to 1939, inclusive. The taxes in dispute were paid as follows: $150.75 on November 9, 1940; $28.80 on November 19, 1940; $23.52 on December 16, 1940; and $1.34 on February 11, 1941. [R. 31, 32, 33, 34, 35.] Claims for refund were filed on September 22, 1942, and were rejected by notice dated July 12, 1943. [R. 31, 32, 33, 34, 35, 56-59.] Within the time provided in Section 3772 of the Internal Revenue Code and on October 27, 1943, the taxpayer brought an action in the District Court

for recovery of the taxes paid. [R. 2-24.] Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code. The original judgment was entered on December 1, 1944 [R. 73-74], and the amended judgment was entered on December 18, 1944. [R. 75-76.] Within three months and on February 27, 1945, notice of appeal was filed [R. 78], pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

Question Presented.

Whether a business trust is subject to the excise tax imposed by Section 901 of the Social Security Act and Section 1600 of the Internal Revenue Code with respect to compensation paid to trustees who perform the duties required of them as trustees under the declaration of trust.

Statutes and Regulations Involved.

These will be found in the Appendix, *infra,* pp. 1 to 3.

Statement.

The appellees, Hooper C. Dunbar, Gordon B. Morris and Craig C. Horton were and now are the trustees of Bell View Oil Syndicate, a trust organized and existing under a written declaration of trust dated January 20, 1922, as amended by written declaration dated September 10, 1925. [R. 30, 35.]

The trust instrument was executed by H. W. McFarlane as grantor and Craig C. Horton, W. A. Roberts, Phil Grohs, H. W. McFarlane, and Hooper C. Dunbar as trustees. By its terms, the trustees agreed to hold in trust a tract of real estate previously conveyed to them by the grantor. The property was described as Lot 5, Block 82, in Santa Fe Springs, California. [R. 36-37.]

The trustees were directed to drill and develop oil wells on the property. [R. 38-39.] They were granted powers to make contracts and conveyances relating to the trust estate, to develop, operate, sell and deal in petroleum, oil properties and wells, to buy, acquire, construct, maintain and operate pipe lines, and to deal in machinery, tools and equipment of all kinds capable of being used in connection with oil, gas, or other utilties. They were given exclusive control of the trust estate and were empowered to collect moneys due the estate, to conduct litigation and to arbitrate or to compromise claims in favor of or against the estate. They were given the sole power to determine what constituted net income available for distribution to unitholders. [R. 39-40.]

Neither the trustees nor the unitholders were to be personally liable for obligations of the business. [R. 40-41.]

The trustees were authorized to fill vacancies among their numbers [R. 41], to elect a president, vice-president, secretary and treasurer, and to appoint such other officers, agents, or attorneys as they deemed appropriate. [R. 46.] The duties and compensation of the officers were to be determined by the trustees. The trustees were also to fix their own remuneration, subject only to the limitation that not more than 10% of the trust income should be used to defray office expenses, officers' salaries, and overhead expenses. [R. 40, 46.]

The trustees were authorized to adopt a seal [R. 39], and to adopt by-laws not inconsistent with the provisions of the trust agreement. [R. 45.] Meetings of the trustees were to be held upon the call of the chairman or of any three of the trustees. [R. 45.] Action by the majority was to be binding on the trust. [R. 45.]

The beneficial interest in the estate was divided into 50,000 units having a par value of $10 and evidenced by transferrable certificates of ownership. [R. 42-44.] Meetings of the unitholders were to be held annually on call of the trustees [R. 46] and proxy voting at such meetings was authorized. [R. 47.]

The term of the trust was stated to be twenty years unless terminated by prior vote of the unitholders. It was expressly provided that the death of a unitholder or trustee during the continuance of the trust should not terminate the trust nor entitle the legal representatives of the deceased unitholder to an accounting. [R. 48.]

As remuneration for their services during 1936, 1937, 1938, and 1939, the trustees received the following sums from Bell View Oil Syndicate [R. 31, 32, 33, 35]:

	1936	1937	1938	1939
Craig C. Horton	$18,000	$12,500	$ 5,700	$4,200
Hooper C. Dunbar	16,200	10,700	4,950	4,200
Gordon B. Morris	13,200	7,700	3,200	1,200
Totals	$47,400	$30,900	$13,850	$9,600

For the purposes of reporting the income of the trust estate for taxation under the federal revenue laws for the year 1939, Bell View Oil Syndicate filed a corporate income tax return form and paid taxes in accordance therewith as provided for in the case of corporations. [R. 64-66.] In this return, it was stated that appellees Dunbar and Horton devoted their entire time to the business while Gordon B. Morris performed part time duties. [R. 65.]

Bell View Oil Syndicate also filed original returns of tax (Form 940) under Title IX of the Social Security Act for the years 1936, 1937 and 1938, and under Chapter 9,

Subchapter C of the Internal Revenue Code for the year 1939 and paid the taxes reported thereon. These returns did not include as wages the compensation paid to the trustees. Upon examination of the returns, the Commissioner of Internal Revenue asserted deficiencies in tax based on his determination that the trustees were employees of the trust whose remuneration was subject to the tax imposed by Title IX of the Social Security Act and Chapter 9, Subchapter C of the Internal Revenue Code. Bell View Oil Syndicate thereupon filed amended returns, Form 940, for each of the years 1936, 1937, 1938 and 1939, including therein as taxable wages the remuneration paid to the trustees. Under the amended returns, Bell View Oil Syndicate paid additional taxes, penalty and interest with respect to compensation paid to the trustees for the years 1936, 1937, 1938 and 1939, in the respective sums of $60.48, $65.59, $48.20 and $30.14. [R. 30-35.]

On September 20, 1942, Bell View Oil Syndicate filed claims for refund of the additional taxes, penalty and interest paid for the years 1936 to 1939, inclusive, on the grounds that the trustees were not employees of the trust for federal unemployment tax purposes. [R. 10-24, 31-32, 33, 34, 35.] These claims were rejected by the Commissioner in a letter dated July 12, 1943. [R. 32, 33, 34, 35, 56-59.]

Statement of Points to Be Urged.

The assignment of errors, all of which are here relied upon, appear in the record at pages 79 and 85. They may be summarized by a statement that the District Court erred in holding that the trustees of the Bell View Oil Syndicate are not employees for federal unemployment tax purposes.

Summary of Argument.

Title IX of the Social Security Act, c. 531, 49 Stat. 620, and Subchapter C, Chapter 9, of the Internal Revenue Code impose an excise tax upon every employer with respect to having individuals in his employ. The Bell View Oil Syndicate is an employer within the meaning of these statutes and subject to the taxes imposed by them. The only question involved in this proceeding is whether the trustees of Bell View Oil Syndicate are employees within the meaning of the statutes.

The term "employee" is not defined in the Social Security Act or in the corresponding provisions of the Internal Revenue Code, and its meaning must therefore be determined in light of the intent and purpose of Congress as expressed in the statutes. The Social Security Act came into existence during a period of widespread unemployment and was designed to protect the welfare of those working for another from the hazards of unemployment. With such history and purpose in mind, an individual comes within the coverage of the Act if he is engaged, as a means of livelihood, in a business not his own. Under the facts of this case, the trustees of Bell View Oil Syndicate earned their living by working for another. They were subject to the evils which the Act sought to correct and were therefore employees within the meaning of the Act even though they were not subject to supervision or control by the beneficiaries of the trust.

ARGUMENT.

I.

For the Purposes of the Social Security Act, the Bell View Oil Syndicate Is a Separate Entity, and as Such Is the Employer of Individuals Rendering Services in Employment.

The tax involved in this proceeding was collected from the Bell View Oil Syndicate under authority of Section 901 of the Social Security Act, and Section 1600 of the Internal Revenue Code [Appendix, *infra*] which provide that every employer "shall pay for each calendar year an excise tax, with respect to having individuals in his employ" equal to stated percentages of wages payable with respect to such employment. The court below found that the trustees of the Bell View Oil Syndicate were principals and employers within the meaning of the statutes. [R. 71.] We believe that this holding disregards the express provisions of the Social Security Act and of the Internal Revenue Code.

Section 907 of the Social Security Act [Appendix, *infra*] provides that as used in Title IX, the term "employer" means a person having in his employ at least eight individuals for a stated number of days during the calendar year.[1] Section 1101(a) of the Act [*Appendix, infra*] defines the term "persons" to include a corporation and the same section further defines the term "corporation"

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[1]Section 1607 of the Internal Revenue Code is the same. The provisions of Title IX of the Social Security Act, and Subchapter C, Chapter 9, of the Internal Revenue Code are identical insofar as pertinent here. Consequently, hereinafter when discussing the Social Security Act and the unemployment provisions of the Internal Revenue Code, reference will be made only to the Act unless otherwise indicated.

to include associations. The Bell View Oil Syndicate was created under a written declaration of trust for the express purpose of acquiring, developing, operating and selling petroleum and petroleum properties, with provisions for continuity of existence, centralized management, limitation of personal liability of participants and transferrable shares of beneficial ownership, and there is little doubt that it is an association within the meaning of Section 1101(a). (*Morrissey v. Commissioner,* 296 U. S. 344; *Helvering v. Coleman-Gilbert,* 296 U. S. 369; *Commissioner v. Security-First Nat. Bank,* 148 F. (2d) 937 (C. C. A. 9th); *Porter v. Commissioner,* 130 F. (2d) 276 (C. C. A. 9th); *Kettleman Hill R. S. No. 1 v. Commissioner,* 116 F. (2d) 382 (C. C. A. 9th).) Although clothed in the garb of a trust, the Bell View Oil Syndicate is, for taxing purposes, a corporation, a separate entity existing above and beyond the individuals of whom it is comprised. It is this entity, the "association", which is the employer of the clerks, the stenographers, and the other individuals whose services to the trust are rendered in such circumstances as to constitute "employment" within the meaning of the Social Security Act.

United States v. Griswold, 124 F. (2d) 599 (C. C. A. 1st), upon which the court below relied, missed the whole point when it held that the trustees there involved were not employees of the trust beneficiaries. The Government had taxed the trust entity, not the beneficiaries.

The trustees of Bell View Oil Syndicate were not in business for themselves, but were managing the business for the benefit of the trust and ultimately those holding units of beneficial interest. True, the trustees were themselves holders of approximately 30% of the outstanding

shares [R. 54], but nevertheless it cannot be said that the business was theirs, for, as a corporation is an entity separate from its stockholders (*Commissioner v. Eldridge*, 79 F. (2d) 629 (C. C. A. 9th); *Continental Oil Co. v. Jones*, 113 F. (2d) 557 (C. C. A. 10th)), so also is an "association" separate from its members for taxing purposes.

II.

The Trustees of the Bell View Oil Syndicate Render Services in Employment Within the Meaning of the Social Security Act.

If, as we believe, the Bell View Oil Syndicate itself is the employer of the individuals performing services for it in employment, there remains for consideration only the question of whether the services of the trustees are rendered in employment. Stated otherwise, are the trustees "employees"?

The term "employee" has not been defined in the Social Security Act and its meaning must therefore be found outside the framework of the statute. At the common law, the question of whether an individual performing services for another is an employee is generally dependent upon the degree of supervision and control exercised by the person for whom the services are performed. (*Singer Manufacturing Co. v. Rahn*, 132 U. S. 518; *United States v. Aberdeen Aerie No. 24*, 148 F. (2d) 655 (C. C. A. 9th); *Hardware Mut. Casualty Co. v. Hildebrandt*, 119 F. (2d) 291 (C. C. A. 10th).) Even if this common law concept of employment has been imported into the Social Security Act and made controlling, the trustees are em-

ployees because they have no independence as individuals but are controlled by the trust estate.

It is the position of the Government, however, that the proper meaning of the term is not to be determined solely by reference to common law standards, but rather must be found by considering the purposes of the Act and the circumstances in which it is sought to be applied.

In this connection see *Lehigh Valley Coal Co. v. Yensavage,* 218 Fed. 547, 552 (C. C. A. 2d), certiorari denied 235 U. S. 705, where the court said:

> "* * * the word * * * must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. * * *"

See, also: *Board v. Hearst Publications,* 322 U. S. 111, 124; *Grace v. Magruder,* 148 F. (2d) 679 (App. D. C.); *United States v. Vogue, Inc.,* 145 F. (2d) 609, 611-612 (C. C. A. 4th).

The purposes and objectives of the Social Security Act are well known. It was designed to protect the nation's economic and social life against the disruption brought about by unemployment resulting from business distress of the employer, or old age of the employed. Left to themselves, the nation's employers voluntarily had made no adequate provision for such circumstances. At the time of the enactment of the legislation, these conditions were everywhere at hand and the provisions of the Act were designed to prevent or alleviate as much as possible such conditions in the future. (H. Rep. No. 615, 74th Cong., 1st Sess., pp. 2-9 (1939-2 Cum. Bull. 600); S. Rep. No. 628, 74th

Cong., 1st Sess., pp. 2-16 (1939-2 Cum. Bull. 611); *Grace v. Magruder, supra;* cf. *Helvering v. Davis,* 301 U. S. 619, 641.)

And these purposes were but a part of a broader Congressional program, the goal of which was to improve the economic position of those whose means of livelihood were dependent upon another, both during employment and unemployment. (*Cf. Board v. Hearst Publications, supra,* p. 126; *Walling v. American Needlecrafts,* 139 F. (2d) 60 (C. C. A. 6th); *Grace v. Magruder, supra; United States v. Vogue, Inc., supra.*)

Thus, in dealing with the problem, Congress was not concerned with whether the employer did or did not relinquish the right to control the services of the employee. (Cf. *Carroll v. Social Security Board,* 128 F. (2d) 876 (C. C. A. 7th).) Its concern was in whether the relationship was one which would produce unemployment if terminated. In this connection, the important factor is whether the individual performing the services is engaged, as a means of livelihood, in labor which constitutes a necessary and integral part of the business affairs of another. (*Grace v. Magruder, supra.*)

It seems evident that the trustees' services constituted a necessary and integral part of the business of Bell View Oil Syndicate and that those services represented the primary occupation of at least two of the trustees. Six wells have been produced on the Santa Fe Springs property. [R. 50.] The trustees operated this property, producing and marketing oil, and performing other functions incident to these operations. [R. 50.] They conducted correspondence, deposited receipts, and disbursed funds. [R. 50,

51.] They held regular meetings weekly and in addition held other meetings. [R. 50.] The discharge of these duties required the full time services of the trustees. [R. 65.] Moreover, in the discharge of their undertaking, the trustees were subject to the hazards of unemployment. Despite the absence in the trust instrument of specific provision for removal of trustees, the parties obviously contemplated that trustees should be subject to removal. [R. 41.] Similarly, the trustees were potentially subject to unemployment by early termination of the trust [R. 48], by insolvency of the estate, or through personal incapacity to work.

In short, the relationship between Bell View Oil Syndicate and its trustees was one in which the trustees were engaged for hire, subject to the risks of unemployment, in building up and enhancing the business of another. In such a relationship are present all of the elements necessary to bring it within the scope of the Social Security Act.

In *Carroll v. Social Security Board,* 128 F. (2d) 876 (C. C. A. 7th), the issue was whether the liquidating receiver of a state bank was an employee of the bank and entitled to social security benefits. The receiver was appointed by the state auditor, was paid from the bank's assets, and while subject to replacement on petition of two-thirds of the creditors, was not otherwise subject to the supervision or control of the bank or its creditors. The Circuit Court of Appeals, reversing the judgment of the District Court affirming the decision of the Appeals Coun-

cil of the Social Security Board, held the plaintiff to be an employee within the meaning of the Social Security Act, stating (pp. 878, 879, 881):

> "* * * an essential characteristic of the relationship of employer and employee is that the former retains the right to control and direct the individual who performs the services, both as to the result to be accomplished by the work, and as to the details and means by which that result is accomplished. Undoubtedly, this proposition generally is sound and sustained by authorities.
>
> The situation presented, however, is so extraordinary that we doubt that it should or can be solved by the application of rules and theories relevant to an ordinary situation. Certainly it must be conceded that plaintiff was rendering services for some one. That he was not working for himself, and that he was not an independent contractor, we assume would also be conceded * * * [and] there is little room for the contention that plaintiff's services were performed as an employee of the state.
>
> By process of elimination, we necessarily find ourselves favorably impressed with plaintiff's contention that he was an employee of the bank, notwithstanding the apparent lack of the element so often stressed in matters of this character—that is, that the bank had no control over the plaintiff's activities. We think the absence of this element is more fanciful than real, but in any event, it is not fatal to plaintiff's theory. * * *
>
> The purpose which Congress had in mind, and the object sought to be accomplished by the enactment before us, is aptly stated in *Helvering v. Davis*, 301 U. S. 619, 640, 672, 57 S. Ct. 904, 81 L. Ed. 1307,

> 107 A. L. R. 1319, *et seq.* That it should be liberally construed in favor of those seeking its benefits cannot be doubted. While the question before us is not free from doubt—in fact, it is extremely close—we are of the opinion that plaintiff was an employee of the bank within the meaning of the Act and entitled to its benefits." * * *

In the *Carroll* case, the court distinguished the case of *United States v. Griswold,* 124 F .(2d) 599 (C. C. A. 1st), in which it had been held that trustees of a Massachusetts business trust were not employees within the meaning of the Social Security Act because they were not subject to control by the beneficiaries. In any event, we think that the *Griswold* case was erroneously decided by reference to concepts which disregard the declared purpose of Congress in enacting the legislation.

Perhaps the clearest indication that Congress intended trustees of a business trust to be included within the coverage of the social security legislation may be found in the history of an attempt by Massachusetts business trusts to secure legislation overruling the official position of the Bureau of Internal Revenue that trustees of a business trust performing duties other than periodic attendance at meetings, and receiving compensation therefor, were employees for purposes of the Social Security Act.[2] While the Social Security Act Amendments of 1939 were under consideration by the Committee of Finance of the Senate, efforts were made to amend the Act to exclude trustees of

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[2]This ruling is published as S.S.T. 136, 1937-1 Cum. Bull. 377. See, also, S.S.T. 284, 1938-1 Cum. Bull. 474; and S.S.T. 337, 1938-2 Cum. Bull. 343.

Massachusetts business trusts from the definition of "employee". Senate Hearings before the Committee of Finance on H. R. 6635, Social Security Act Amendments, 76th Cong., 1st Sess., pp. 105-114. The Committee refused to make the requested change.

While H. R. 6635 was pending before Congress, another effort was made to exclude trustees from the Act by the introduction of a separate bill, S. 2680, 76th Cong., 1st Sess., which provided that a trustee holding either alone or with no more than four other persons, the legal title to trust property, would not be an employee of the trust irrespective of whether the trust was an association taxable as a corporation. This bill was referred to the Senate Finance Committee (84 Cong. Record, Part 7, p. 7681) which requested the views of the Treasury Department on the proposed legislation. The comments of the Treasury recommending against enactment of the bill are printed in the Congressional Record of July 13, 1939 (84 Cong. Record, Part 8, pp. 9,030-9,031). No further action was taken on the bill. It may be presumed that by twice rejecting proposals to pass legislation overruling S. S. T. 136, 1937-1 Cum. Bull. 377, the Committee indicated its approval of the Bureau's ruling that compensated trustees performing substantial services for a business trust are employees within the meaning of the Act irrespective of the degree of control to which they are subject.[3]

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[3]We do not regard the views expressed by this Court in the case of *United States v. Aberdeen Aerie No. 24*, 148 F. (2d) 655, as being inconsistent with this position in light of the admittedly professional status of the doctors involved in that case as well as the fact that their services for the Aerie represented a comparatively minor portion of their professional practice.

Conclusion.

For the reasons stated herein, it is submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
MAURICE P. WOLK,
Special Assistants to the Attorney General.

CHARLES H. CARR,
United States Attorney.

E. H. MITCHELL,
GEORGE M. BRYANT,
Assistant United States Attorneys.

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue.

September, 1945.

APPENDIX.

Social Security Act, c. 531, 49 Stat. 620:

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE.

Section 901. On and after January 1, 1936, every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in Section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in Section 907) during such calendar year:

* * * * * * * * *

(42 U. S. C., 1940 ed., Sec. 1101.)

Section 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, * * *

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * * * * * * * *

(42 U. S. C., 1940 ed., Sec. 1107.)

TITLE IX—GENERAL PROVISIONS

Section 1101. (a) When used in this Act—

* * * * * * * * *

(3) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(4) The term "corporation" includes association, joint-stock companies, and insurance companies.

* * * * * * * * *

(42 U. S. C., 1940 ed., Sec. 1301.)

The foregoing provisions were re-enacted in the Internal Revenue Code and became Sections 1600, 1607(a), (b), and (c), 3797(a), (3), and (4) of that statute.

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:[4]

ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907(c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

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[4]These Regulations are also applicable to Subchapter C of Chapter 9 and other provisions of the Internal Revenue Code for the calendar year 1939.

The words "employ," "employer," and "employee," as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * * * * * * *

Rec'd 6, 7 apples brief

ABBREVIATIONS.

The following abbreviations are used throughout the Bulletin:

A, B, C, etc.—The names of individuals.
A. R. M.—Committee on Appeals and Review memorandum.
A. R. R.—Committee on Appeals and Review recommendation.
A. T.—Alcohol Tax Unit.
B. T. A.—Board of Tax Appeals.
C. B.—Cumulative Bulletin.
Ct. D.—Court decision.
C. S. T.—Capital Stock Tax Division.
C. T.—Taxes on Employment by Carriers.
D. C.—Treasury Department circular.
Em. T.—Taxes imposed by the Social Security Act, the Carriers Taxing Act of 1937, and Subchapters A, B, and C of the Internal Revenue Code.
E. T.—Estate Tax Division.
G. C. M.—General Counsel's, Assistant General Counsel's, or Chief Counsel's memorandum.
I. R. B.—Internal Revenue Bulletin.
I. R. C.—Internal Revenue Code.
I. T.—Income Tax Unit.
M, N, X, Y, Z, etc.—The names of corporations, places, or businesses, according to context.
Mim.—Mimeographed letter.
MS. or M. T.—Miscellaneous Division.
O. or L. O.—Solicitor's law opinion.
O. D.—Office decision.
Op. A. G.—Opinion of the Attorney General.
P. T.—Processing Tax Division.
S. T.—Sales Tax Division.
Sil.—Silver Tax Division.
S. M.—Solicitor's memorandum.
Sol. Op.—Solicitor's opinion.
S. R.—Solicitor's recommendation.
S. S. T.—Taxes on employment by others than carriers.
T.—Tobacco Division.
T. B. M.—Advisory Tax Board memorandum.
T. B. R.—Advisory Tax Board recommendation.
T. C.—Tax Court of the United States.
T. D.—Treasury decision.
x and y are used to represent certain numbers, and when used with the word "dollars" represent sums of money.

ANNOUNCEMENT RELATING TO DECISIONS OF THE TAX COURT OF THE UNITED STATES, FORMERLY UNITED STATES BOARD OF TAX APPEALS.

In order that taxpayers and the general public may be informed whether the Commissioner has acquiesced in a decision of The Tax Court of the United States, formerly known as the United States Board of Tax Appeals, disallowing a deficiency in tax determined by the Commissioner to be due, announcement will be made in the bi-weekly Internal Revenue Bulletin at the earliest practicable date. (No announcements are made in the Bulletin with respect to memorandum opinions of The Tax Court.) Notice that the Commissioner has acquiesced or nonacquiesced in a decision of The Tax Court relates only to the issue or issues decided adversely to the Government. Decisions so acquiesced in should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases.

CUMULATIVE CONTENTS.[1]

BIWEEKLY BULLETINS 1946-1 TO 1946-3.

[1] The cumulative contents includes all rulings published since January 1, 1946. The figures in the page column refer to the pages of the Bulletin in which the ruling was published.

INCOME TAX.—PART I.

A. INTERNAL REVENUE CODE.

SECTION 22(b).—GROSS INCOME: EXCLUSIONS FROM GROSS INCOME.

SECTION 29.22(b)(13)–1: Compensation of military and naval forces. (Also Section 3808.) 1946–3–12224 Mim. 5972

Provisions of Revenue Act of 1945 relating to members of the armed forces.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington 25, D. C., January 9, 1946,

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

1. Reference is made to sections 141, 142(a), and 142(b) of the Revenue Act of 1945, which provide additional relief for members and veterans of the armed forces. The purpose of this mimeograph is to summarize these provisions and to describe the administrative procedure to be used. As stated in previous mimeographs, the policy of the Bureau is to deal with all tax matters affecting members of the armed forces "in a cooperative and sympathetic manner." Accordingly, claims clerks, auditors, and other Internal Revenue employees concerned should be instructed to give special and prompt attention to such claims and applications as may arise under these provisions.

EXCLUSIONS OF SERVICE PAY.

2. *Commissioned officers, or commissioned warrant officers, in the military and naval forces of the United States; citizens or residents of the United States as members of the military or naval forces of any of the other United Nations.*—The Revenue Act of 1945 makes no change with respect to the exclusion of the first $1,500 of active service pay received by taxpayers in the foregoing classifications. This exclusion has been in effect for taxable years beginning on or after January 1, 1943, and will continue until the present war is declared terminated by the President.

3. *Enlisted personnel.*—Active service pay received by members of the armed forces of the *United States* below the grade of commissioned officer or commissioned warrant officer, during taxable years beginning on or after January 1, 1941, will be excluded from gross income for the purpose of computing income tax until the present war is declared terminated by the President.

4. Armed forces personnel or veterans inquiring with respect to the additional exclusions should be informed of these benefits. If the tax

has been paid for years in which additional exclusions may be allowed, instruction and assistance should be given in the preparation of appropriate claims for refund or credit on Form 843. It follows that any unpaid assessment should be abated to the extent that it may be reduced by taking into consideration the additional exclusion. It will be necessary, however, to examine the returns and accounts on which credits, refunds, or abatements are based to determine the validity of the claim and the extent to which it may be allowed. A refund or credit of any overpayment of the tax for 1941 and 1942 (taxable years beginning after December 31, 1940, and before January 1, 1943) may be allowed if the claim is filed before January 1, 1947, even though the allowance is otherwise prevented by the statute of limitations or the operation of any other law or rule (other than compromises as provided for in section 3761 of the Code).

DEFERMENT OF PAYMENT OF TAXES.

5. The new Act provides that payment of unpaid taxes for WAR YEARS which are attributable to active SERVICE PAY and PRE-SERVICE EARNED INCOME may be made in 12 quarterly installments beginning on a prescribed FIRST INSTALLMENT DATE. This deferment is allowable upon application before the first installment date to persons who served as members of the armed forces of the United States during the present war (not to persons who served only in the forces of any other nation). In order that the amounts of tax subject to extension for payment and the installment dates on which payments are due may be readily determined, the following explanation of the terms used in the Act are given:

(*a*) *Tax attributable to service pay* means the total tax for a war year reduced by the tax on income other than active service pay received from the United States. However, if the service person is a commissioned officer, or commissioned warrant officer, of the regular component of the Army, Navy, Marine Corps, or Coast Guard, none of his liability may be defined as "tax attributable to service pay" unless he was being granted relief on the due date(s), from paying tax because he was on sea duty or outside the continental United States.

(*b*) *Tax attributable to pre-service earned income* is computed as follows: (1) Determine taxable income, as defined under Chapter 1 of the Code, for war year and compute the tax; (2) subtract earned income other than service earned income from taxable income determined in (1) and compute the tax on this balance; (3) subtract the tax computed in (2) from the tax computed in (1). The resulting liability is the "tax attributable to pre-service earned income."

(*c*) *War year* when used with respect to the "tax attributable to service pay" means any taxable year (calendar or fiscal) beginning after December 31, 1939, and before January 1, 1947. *War year* when used with respect to "pre-service earned income" means any taxable year (calendar or fiscal) beginning after December 31, 1939, and before January 1, 1942, if the taxable year began before the taxpayer entered upon active service and if at least a part of the tax became due and payable after he entered upon active service.

(*d*) *The first installment date* for taxpayers released from active service at any time before December 1, 1945, is May 15, 1946. *The first installment date* in all other cases is June 15, 1947, *or* the 15th day

of the sixth month which begins after the date of the taxpayer's release from active duty, whichever is the earlier. However, none of the above dates is to be effective to bring the first installment due before the 15th day of the third month following the close of the taxable year to which the tax applies; nor are any of the above dates to be effective to bring the first installment due before the postponed due date established because of sea duty, or duty outside the continental United States.

The table set forth below presents a convenient reference for determining first installment dates:

Date of release (if any).	If deferred tax is attributable to—				
	A calendar year—		A fiscal year—		
	1940, 1941 1942, 1943 1944, 1945	1946	Beginning after Jan. 31, 1940, and ending before Mar. 1, 1946.	Beginning after Mar. 31, 1945, and ending before Mar. 1, 1947.	Beginning after Mar. 31, 1946, and ending before Dec. 1, 1947.
	The first installment date is—				
Before Dec. 1, 1945	May 15, 1946	Mar. 15, 1947	May 15, 1946	Regular due date.	Regular due date.
During:					
December, 1945	June 15, 1946	Mar. 15, 1947	June 15, 1946	Regular due date OR the 15th day of sixth month beginning after date of release whichever is the later.	The regular due date of return.
January, 1946	July 15, 1946	Mar. 15, 1947	July 15, 1946		
February, 1946	Aug. 15, 1946	Mar. 15, 1947	Aug. 15, 1946		
March, 1946	Sept. 15, 1946	Mar. 15, 1947	Sept. 15, 1946		
April, 1946	Oct. 15, 1946	Mar. 15, 1947	Oct. 15, 1946		
May, 1946	Nov. 15, 1946	Mar. 15, 1947	Nov. 15, 1946		
June, 1946	Dec. 15, 1946	Mar. 15, 1947	Dec. 15, 1946		
July, 1946	Jan. 15, 1947	Mar. 15, 1947	Jan. 15, 1947		
August, 1946	Feb. 15, 1947	Mar. 15, 1947	Feb. 15, 1947		
September, 1946	Mar. 15, 1947	Mar. 15, 1947	Mar. 15, 1947		
October, 1946	Apr. 15, 1947	Apr. 15, 1947	Apr. 15, 1947		
November, 1946	May 15, 1947	May 15, 1947	May 15, 1947		
In service after Nov. 30, 1946	June 15, 1947	June 15, 1947	June 15, 1947	June 15, 1947	Regular due date.

COLLECTORS' PROCEDURE ON DEFERMENTS OF TAXES FOR MILITARY AND NAVAL PERSONNEL.

6. Since the granting of an extension of time for payment will be conditioned upon an application made prior to the first installment date, an examination of the return(s) and account(s) for the year(s) involved will be necessary to determine the unpaid tax attributable to (1) service pay and (2) pre-service earned income. The application for extension may be made by the taxpayer in any convenient written form. No formal type of application form will be prescribed, although the collector may, if he desires, prepare a mimeographed form for this purpose to aid in conveniently serving the taxpayers. When the return(s) and account(s) have been examined, the taxpayer should be advised that his application has been given consideration and that he will receive, prior to the installment dates, notices of the amounts to be paid. If the return(s) and account(s) disclose any unpaid tax which may not be deferred under the provisions of the Act, the taxpayer should be advised to that effect and as to the amount

which may not be deferred. However, collectors should continue to give full recognition to the extensions provided in section 513 of the Soldiers' and Sailors' Civil Relief Act, section 3804 of the Code, and Treasury Decision 5279 (C. B. 1943, 952) as they apply to such unpaid liabilities. The policy set forth in Mimeograph 5931 should also continue to serve as the basis for collection of liabilities not subject to the new installment method of payment.

7. When an extension has been granted under the installment method of payment, the date of application and the statutory authority should be noted on the account. When the amounts of the installments have been determined, notices should be prepared. The form to be used for this purpose is to be mimeographed by collectors and should be substantially similar to Exhibit I attached to this mimeograph. A tickler file should be established for the notices so that each one can be mailed to the taxpayer approximately 10 days before the due date of the installment. If more than one year's liability for a particular taxpayer is involved, notices should be prepared for each account. If the installment dates for each of the accounts coincide, the various notices should be mailed in one envelope at the appropriate time. The date of mailing of each notice should also be noted on the account. While one-twelfth of the amount extended is to be paid on the first installment date and one-twelfth is to be paid every three months thereafter until the full amount of the tax extended is paid, the taxpayer may complete payment before the specified installment dates if he wishes. However, advance payment of installments should not be construed as advancing any of the remaining installment dates. When advance payments of installments are received, the notices to which such payments apply shall be so marked to prevent their being mailed.

8. It will be the policy to allow the installment method of payment to continue until the date of the twelfth installment is reached even though the taxpayer either completely fails to make payment of one or more installments or does not make timely payment of one or more installments. Under the installment method of payment, tax attributable to service pay and pre-service earned income will be considered for practical and administrative purposes to be 12 equal and separate amounts. Thus interest on any delinquent installment will be computed at the rate of 6 per cent per annum from the due date of the installment to the date of payment.

9. *Suspension of period of limitation.*—The running of the period of limitation for collection of taxes after assessment as set forth in section 276(c) of the Code shall be suspended for the period beginning with the date of filing an application for the installment method of payment and ending six months after the date prescribed for the payment of the last installment.

ESTIMATED TAX.

10. If a taxpayer is eligible for deferment of payment of tax with respect to any "war year," he may disregard compensation received for active service as a member of the military or naval forces of the United States in determining his gross income for the purpose of computing estimated tax for such year. This provision is also to be applied for the purpose of considering penalties for underestimation of tax. However, this provision shall not apply to any person who at the

time for making a declaration of estimated tax for any " war year," is a commissioned officer or a commissioned warrant officer of the *regular* component of the Army, Navy, Marine Corps, or Coast Guard.

INTEREST.

11. Any interest paid prior to November 8, 1945 (the date of enactment of the Revenue Act of 1945), with respect to tax for which payment could be deferred under the Act, shall be credited or refunded if the claim is filed before January 1, 1947. It follows that any such interest that has accrued will not be assessed, and that any such interest which has been assessed but not collected, will be abated. Any interest accruing or assessed on or after November 8, 1945, and before the date which would be the first installment date with respect to tax for which payment could be deferred will for administrative reasons not be assessed or collected. If such interest has been paid it will be credited or refunded if the claim is filed within the time prescribed under the general rules provided in section 322 of the Code.

12. The provisions of the Revenue Act of 1945 should not be construed as conflicting with section 3804 of the Code, section 513 of the Soldiers' and Sailors' Civil Relief Act, or Treasury Decision 5279. Instead, as explained in this mimeograph, the Revenue Act of 1945 provides for further relief and benefits to veterans and servicemen.

13. Correspondence relative to the contents of this mimeograph should refer to its number and to the symbols A&C: Col.

WM. T. SHERWOOD,
Acting Commissioner.

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EXHIBIT I.

NOTICE OF INCOME TAX INSTALLMENT DUE UNDER 12 QUARTERLY PAYMENT PLAN FOR VETERANS AND SERVICEMEN.

Taxable year.	Total tax deferred.	Unpaid balance.	Amount of this installment.	Date this installment is due.

Name, address, and account number:.....

To insure proper credit please return this notice with your remittance.

Your remittance, together with this notice, should reach the office of collector of internal revenue,..... (address) not later than the date shown above. Make check or money order payable to "Collector of Internal Revenue." An installment not paid on time will bear interest at the rate of 6 per cent per annum from the date due until paid.

SECTION 23(a).—DEDUCTIONS FROM GROSS INCOME: EXPENSES.

SECTION 19.23(a)–2: Traveling expenses. 1946–3–12225
(Also Section 24, Section 19.24–1.) Ct. D. 1659

INCOME TAX—INTERNAL REVENUE CODE—DECISION OF SUPREME COURT.

1. GROSS INCOME—DEDUCTIONS—TRAVELING EXPENSES.

The taxpayer, who has resided with his family in Jackson, Miss., since 1903, became in 1906 an employee of a railroad which had its

main office in Mobile, Ala. An arrangement with the railroad permitted him to determine for himself the amount of time spent in each of the two cities. Taxpayer's principal post of business was at the main office, but during the taxable years 1939 and 1940 he spent most of his time in Jackson. He made 33 trips in 1939 and 40 trips in 1940 between the two cities, and deducted in his Federal income tax returns traveling expenses from Jackson to Mobile and living expenses while in Mobile. *Held:* The taxpayer is not entitled to a deduction for traveling and living expenses while away from home in the pursuit of a trade or business under the provisions of section 23(a)(1)(A) of the Internal Revenue Code. His expenses were incurred solely as the result of his desire to maintain a home in Jackson. Traveling expenses in pursuit of business, within the meaning of the section, could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors.

[NOTE.—The Court found it unnecessary to decide the meaning of the word "home" as used in section 23(a)(1)(A) of the Code.]

2. DECISION REVERSED.

Decision of the United States Circuit Court of Appeals, Fifth Circuit (148 Fed. (2d), 163), reversing memorandum opinion of The Tax Court, reversed.

SUPREME COURT OF THE UNITED STATES.

Commissioner of Internal Revenue, petitioner, v. *J. N. Flowers.*

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1946.]

OPINION.

Mr. Justice MURPHY delivered the opinion of the Court.

This case presents a problem as to the meaning and application of the provision of section 23(a)(1)(A) of the Internal Revenue Code[1] allowing a deduction for income tax purposes of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

The taxpayer, a lawyer, has resided with his family in Jackson, Miss., since 1903. There he has paid taxes, voted, schooled his children and established social and religious connections. He built a house in Jackson nearly 30 years ago and at all times has maintained it for himself and his family. He has been connected with several law firms in Jackson, one of which he formed and which has borne his name since 1922.

In 1906 the taxpayer began to represent the predecessor of the Gulf, Mobile & Ohio Railroad, his present employer. He acted as trial counsel for the railroad throughout Mississippi. From 1918 until 1927 he acted as special counsel for the railroad in Mississippi. He was elected general solicitor in 1927 and continued to be elected to that position each year until 1930, when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad.

The main office of the Gulf, Mobile & Ohio Railroad is in Mobile, Ala., as was also the main office of its predecessor. When offered the position of general

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[1] 26 U. S. C., section 23(a)(1)(A), as amended (56 Stat., 819).

SEC. 23. DEDUCTIONS FROM GROSS INCOME.—

in computing net income there shall be allowed as deductions:

(a) EXPENSES.—

(1) TRADE OR BUSINESS EXPENSES.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

solicitor in 1927, the taxpayer was unwilling to accept it if it required him to move from Jackson to Mobile. He had established himself in Jackson both professionally and personally and was not desirous of moving away. As a result, an arrangement was made between him and the railroad whereby he could accept the position and continue to reside in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both places. This arrangement permitted the taxpayer to determine for himself the amount of time he would spend in each of the two cities and was in effect during 1939 and 1940, the taxable years in question.

The railroad company provided an office for the taxpayer in Mobile but not in Jackson. When he worked in Jackson his law firm provided him with office space, although he no longer participated in the firm's business or shared in its profits. He used his own office furniture and fixtures at this office. The railroad, however, furnished telephone service and a typewriter and desk for his secretary. It also paid the secretary's expenses while in Jackson. Most of the legal business of the railroad was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad. The taxpayer's participation was advisory only and was no different from his participation in the railroad's legal business in other areas.

The taxpayer's principal post of business was at the main office in Mobile. However, during the taxable years of 1939 and 1940, he devoted nearly all of his time to matters relating to the merger of the railroads. Since it was left to him where he would do his work, he spent most of his time in Jackson during this period. In connection with the merger, one of the companies was involved in certain litigation in the Federal court in Jackson and the taxpayer participated in that litigation.

During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two cities. During 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips between the two cities. The railroad paid all of his traveling expenses when he went on business trips to points other than Jackson or Mobile. But it paid none of his expenses in traveling between these two points or while he was at either of them.

The taxpayer deducted $900 in his 1939 income tax return and $1,620 in his 1940 return as traveling expenses incurred in making trips from Jackson to Mobile and as expenditures for meals and hotel accommodations while in Mobile.[2] The Commissioner disallowed the deductions, which action was sustained by The Tax Court. But the Fifth Circuit Court of Appeals reversed The Tax Court's judgment (148 Fed. (2d), 163), and we granted certiorari because of a conflict between the decision below and that reached by the Fourth Circuit Court of Appeals in *Barnhill* v. *Commissioner* (148 Fed. (2d), 913 [Ct. D. 1646, I. R. B. 1945–19, 2]).

The portion of section 23(a)(1)(A) authorizing the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" is one of the specific examples given by Congress in that section of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." It is to be contrasted with the provision of section 24(a)(1) of the Internal Revenue Code disallowing any deductions for "personal, living, or family expenses." And it is to be read in light of the interpretation given it by section 19.23(a)–2 of Treasury Regulations 103, promulgated under the Internal Revenue Code. This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts,[3] is deemed to possess implied legislative approval and to have the effect of law. (*Helvering* v. *Winmill*, 305 U. S., 79 [Ct. D. 1365, C. B. 1938–2, 212]; *Boehm* v. *Commissioner*, 326 U. S., — [Ct. D. 1652, I. R. B. 1945–23, 10].). In pertinent part, this interpretation states that "Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses. * * * Only such expenses as are reasonable

[2] No claim for deduction was made by the taxpayer for the amounts spent in traveling from Mobile to Jackson. He also took trips during the taxable years to Washington, New York, New Orleans, Baton Rouge, Memphis, and Jackson (Tenn.), which were apparently in the nature of business trips for which the taxpayer presumably was reimbursed by the railroad. No claim was made in regard to them.

[3] Article 23(a)–2 of Regulations 101, 94, 86; article 122 of Regulations 77 and 74; article 102 of Regulations 69 and 65; article 101(a) of Regulations 62.

and necessary in the conduct of the business and directly attributable to it may be deducted. * * * Commuters' fares are not considered as business expenses and are not deductible."

Three conditions must thus be satisfied before a traveling expense deduction may be made under section 23(a)(1)(A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. (See *Commissioner* v. *Heininger*, 320 U. S., 467, 475 [Ct. D. 1596, C. B. 1944, 484].) And The Tax Court's inferences and conclusions on such a factual matter, under established principles, should not be disturbed by an appellate court. (*Commissioner* v. *Scottish American Co.*, 323 U. S., 119 [Ct. D. 1619, C. B. 1944, 340]; *Dobson* v. *Commissioner*, 320 U. S., 489 [Ct. D. 1597, C. B. 1944, 56].)

In this instance, The Tax Court without detailed elaboration concluded that "The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It accordingly disallowed the deductions on the ground that they represent living and personal expenses rather than traveling expenses incurred while away from home in the pursuit of business. The court below accepted The Tax Court's findings of fact but reversed its judgment on the basis that it had improperly construed the word "home" as used in the second condition precedent to a traveling expense deduction under section 23(a)(1)(A). The Tax Court, it was said, erroneously construed the word to mean the post, station or place of business where the taxpayer was employed—in this instance, Mobile—and thus erred in concluding that the expenditures in issue were not incurred "while away from home." The court below felt that the word was to be given no such "unusual" or "extraordinary" meaning in this statute, that it simply meant "that place where one in fact resides" or "the principal place of abode of one who has the intention to live there permanently." (148 Fed. (2d), at 164.) Since the taxpayer here admittedly had his home, as thus defined, in Jackson and since the expenses were incurred while he was away from Jackson, the deduction was permissible.

The meaning of the word "home" in section 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. (4 Mertens, Law of Federal Income Taxation (1942), section 25.82.) The Tax Court[4] and the administrative rulings[5] have consistently defined it as the equivalent of the taxpayer's place of business. (See *Barnhill* v. *Commissioner*, supra (C. C. A. 4).) On the other hand, the decision below and *Wallace* v. *Commissioner* (144 Fed. (2d), 407 (C. C. A. 9)), have flatly rejected that view and have confined the term to the taxpayer's actual residence. (See also *Coburn* v. *Commissioner*, 138 Fed. (2d), 763 (C. C. A. 2).)

We deem it unnecessary here to enter into or to decide this conflict. The Tax Court's opinion, as we read it, was grounded neither solely nor primarily upon that agency's conception of the word "home." Its discussion was directed mainly toward the relation of the expenditures to the railroad's business, a relationship required by the third condition of the deduction. Thus even if The Tax Court's definition of the word "home" was implicit in its decision and even if that

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[4] *Bixler* v. *Commissioner* (5 B. T. A., 1181); *Griesemer* v. *Commissioner* (10 B. T. A., 386); *Brown* v. *Commissioner* (13 B. T. A., 832); *Duncan* v. *Commissioner* (17 B. T. A., 1088); *Peters* v. *Commissioner* (19 B. T. A., 901); *Lindsay* v. *Commissioner* (34 B. T. A., 840); *Powell* v. *Commissioner* (34 B. T. A., 655); *Tracy* v. *Commissioner* (39 B. T. A., 578); *Priddy* v. *Commissioner* (43 B. T. A., 18); *Schurer* v. *Commissioner* (3 T. C., 544); *Gustafson* v. *Commissioner* (3 T. C., 998).

[5] Section 19.23(a)–2 of Treasury Regulations 103 does not attempt to define the word "home" although the Commissioner argues that the statement therein contained to the effect that commuters' fares are not business expenses and are not deductible "necessarily rests on the premise that 'home' for tax purposes is at the locality of the taxpayer's business headquarters." Other administrative rulings have been more explicit in treating the statutory home as the abode at the taxpayer's regular post of duty. (See, e. g., O. D. 1021, C. B. 5, 174 (1921); I. T. 1264, C. B. I–1, 122 (1922); I. T. 3314, C. B. 1939–2, 152; G. C. M. 23672, C. B. 1943, 66.)

definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad's business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction.

Turning our attention to the third condition, this case is disposed of quickly. There is no claim that The Tax Court misconstrued this condition or used improper standards in applying it. And it is readily apparent from the facts that its inferences were supported by evidence and that its conclusion that the expenditures in issue were nondeductible living and personal expenses was fully justified.

The facts demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad. Jackson was his regular home. Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be nondeductible living and personal expenses lacking the necessary direct relation to the prosecution of the business. The character of such expenses is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the costs of transportation, food and lodging. Whether he maintained one abode or two, whether he traveled 3 blocks or 300 miles to work, the nature of these expenditures remained the same.

The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal and living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad's legal business. The railroad did not require him to travel on business from Jackson to Mobile or to maintain living quarters in both cities. Nor did it compel him, save in one instance, to perform tasks for it in Jackson. It simply asked him to be at his principal post in Mobile as business demanded and as his personal convenience was served, allowing him to divide his business time between Mobile and Jackson as he saw fit. Except for the Federal court litigation, all of the taxpayer's work in Jackson would normally have been performed in the headquarters at Mobile. The fact that he traveled frequently between the two cities and incurred extra living expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer.

Travel expenses in pursuit of business within the meaning of section 23(a)(1)(A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here.

It follows that the court below erred in reversing the judgment of The Tax Court.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Dissenting opinion by Mr. Justice RUTLEDGE.

SECTION 23(b).—DEDUCTIONS FROM GROSS INCOME: INTEREST.

SECTION 19.23(b)–1: Interest.

INTERNAL REVENUE CODE.

Payments made by corporation to holders of corporate obligations. (See Ct. D. 1660, page 27.)

SECTION 24.—ITEMS NOT DEDUCTIBLE.

SECTION 19.24–1: Personal and family expenses.

INTERNAL REVENUE CODE.

Traveling and living expenses not incurred in the pursuit of trade or business. (See Ct. D. 1659, page 6.)

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

SECTION 19.115–1: Dividends.

INTERNAL REVENUE CODE.

Payments made by corporation to holders of corporate obligations. (See Ct. D. 1660, page 27.)

SECTION 141.—CONSOLIDATED RETURNS.

REGULATIONS 104, SECTION 23.11: Consolidated returns for subsequent years. (Also Section 33.11, Regulations 110.) 1946–3–12226 I. T. 3779

INTERNAL REVENUE CODE.

Election with respect to filing separate Federal income and excess profits tax returns for fiscal years ending in 1946 by affiliated corporations which filed consolidated Federal income and excess profits tax returns for fiscal years ended in 1945.

Advice is requested whether affiliated corporations which filed consolidated Federal income and excess profits tax returns for fiscal years ended in 1945 may elect to file separate Federal income and excess profits tax returns for fiscal years ending in 1946.

Section 141(a) of the Internal Revenue Code, as amended, provides in part as follows:

(a) PRIVILEGE TO FILE CONSOLIDATED INCOME AND EXCESS-PROFITS-TAX RETURNS.— * * * The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. * * *

Section 23.11(*a*) of Regulations 104, as amended by Treasury Decision 5087 (C. B. 1941–2, 141), relating to consolidated income tax returns of affiliated corporations, provides in part as follows:

(*a*) CONSOLIDATED RETURNS REQUIRED FOR SUBSEQUENT YEARS.—If a consolidated return is made under these regulations for any taxable year, a consolidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless * * * (2) *Chapter 1 of the Code to the extent applicable to corporations,* or these regulations which have been con-

sented to, have been amended and any such amendment is of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated returns, * * *. [Italics supplied.]

Section 33.11(*a*) of Regulations 110, as amended by Treasury Decision 5087, supra, relating to consolidated excess profits tax returns of affiliated corporations, provides in part as follows:

(*a*) CONSOLIDATED RETURNS REQUIRED FOR SUBSEQUENT YEARS.—If a consolidated return is made under these regulations for any taxable year, a consolidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless * * * (2) *Chapter 1 of the Code to the extent applicable to corporations, or Subchapter E of Chapter 2 of the Code,* or these regulations which have been consented to, have been amended and any such amendment is of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated returns, * * *. [Italics supplied.]

It is held that Chapter 1 and Subchapter E of Chapter 2 of the Internal Revenue Code have been so amended by the Revenue Act of 1945 as to make less advantageous to affiliated groups as a class the continued filing of consolidated Federal income and excess profits tax returns for taxable years ending after December 31, 1945. Accordingly, affiliated corporations which filed consolidated income and excess profits tax returns for fiscal years ended in 1945 may, notwithstanding the filing of such returns, file separate income and excess profits tax returns for fiscal years ending in 1946.

REGULATIONS 104, SECTION 23.11: Consolidated returns for subsequent years.
(Also Section 33.11, Regulations 110.)

1946–3–12227
I. T. 3780

INTERNAL REVENUE CODE.

Election with respect to filing separate Federal income and excess profits tax returns for the calendar year 1945 by affiliated corporations which filed consolidated Federal income and excess profits tax returns for the calendar year 1944.

Advice is requested whether affiliated corporations which filed consolidated Federal income and excess profits tax returns for the calendar year 1944 may elect to file separate Federal income and excess profits tax returns for the calendar year 1945.

Section 141(a) of the Internal Revenue Code, as amended, provides in part as follows:

(a) PRIVILEGE TO FILE CONSOLIDATED INCOME AND EXCESS-PROFITS-TAX RETURNS.— * * * The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. * * *

Section 23.11(*a*) of Regulations 104, as amended by Treasury Decision 5087 (C. B. 1941–2, 141), relating to consolidated income tax returns of affiliated corporations, provides as follows:

(*a*) CONSOLIDATED RETURNS REQUIRED FOR SUBSEQUENT YEARS.—If a consolidated return is made under these regulations for any taxable year, a con-

solidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless (1) a corporation (other than a corporation created or organized, directly or indirectly, by a member of the group) has become a member of the group during such subsequent taxable year, or (2) Chapter 1 of the Code to the extent applicable to corporations, or these regulations which have been consented to, have been amended and any such amendment is of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated returns, or (3) the Commissioner, prior to the time of making the return, upon application made by the common parent corporation and for good cause shown, grants permission to change.

Section 33.11(*a*) of Regulations 110, as amended by Treasury Decision 5087, supra, relating to consolidated excess profits tax returns of affiliated corporations, provides as follows: .

(*a*) CONSOQIDATED RETURNS REQUIRED FOR SUBSEQUENT YEARS.—If a consolidated return is made under these regulations for any taxable year, a consolidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless (1) a corporation (other than a corporation created or organized, directly or indirectly, by a member of the group) has become a member of the group during such subsequent taxable year, or (2) Chapter 1 of the Code to the extent applicable to corporations, or Subchapter E of Chapter 2 of the Code, or these regulations which have been consented to, have been amended and any such amendment is of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated returns, or (3) the Commissioner, prior to the time of making the return, upon application made by the common parent corporation and for good cause shown, grants permission to change.

It is held that the amendments to the Internal Revenue Code by the Tax Adjustment Act of 1945 and the Revenue Act of 1945, and the amendments to Regulations 104 and to Regulations 110 by Treasury Decision 5476 (I. R. B. 1945–18, 4) are not of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated Federal income and excess profits tax returns for the calendar year 1945. (The Revenue Act of 1945 made no changes affecting the computation of corporation income and excess profits taxes for the calendar year 1945.) Accordingly, affiliated corporations which filed consolidated income and excess profits tax returns for the calendar year 1944 will not be permitted to file separate income and excess profits tax returns for the calendar year 1945, unless one of the other conditions provided in section 23.11(*a*) of Regulations 104, supra, and section 33.11(*a*) of Regulations 110, supra, is met or unless the law or regulations with respect to the calendar year 1945 are later amended so as to make less advantageous the continued filing of consolidated returns. (Cf. I. T. 3769, I. R. B. 1945–22, 11.)

REGULATIONS 110, SECTION 33.11: Consolidated returns for subsequent years.

INTERNAL REVENUE CODE.

Election to file separate returns for fiscal years ending in 1946 where an affiliated group filed consolidated returns for fiscal years ended in 1945. (See I. T. 3779, page 11.)

REGULATIONS 110, SECTION 33.11: Consolidated returns for subsequent years.

INTERNAL REVENUE CODE.

Election to file separate returns for calendar year 1945 where an affiliated group filed consolidated returns for calendar year 1944. (See I .T. 3780, page 12.)

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

SECTION 29.143–2: Fixed or determinable annual or periodical income. 1946–3–12228 I. T. 3781

INTERNAL REVENUE CODE.

Amounts distributed pursuant to a plan of reorganization which are taxable as dividends by reason of section 112(c)(2) of the Internal Revenue Code do not constitute dividends or other fixed or determinable annual or periodical income within the meaning of section 143(b) of the Code, and such amounts are not subject to withholding of tax at the source when distributed to nonresident alien stockholders.

Advice is requested whether income tax is required to be withheld at the source under section 143(b) of the Internal Revenue Code with respect to corporate distributions which qualify as dividends under section 112(c)(2) of the Code, when such distributions are made to nonresident alien stockholders.

In the case under consideration, involving a reorganization as defined in section 112(g) of the Code, the cumulative preferred stock and the no-par common stock of the reorganized company were converted into new cumulative convertible preferred stock and new par value common stock, respectively. The dividends on the old preferred stock had not been paid for several years prior to reorganization. Pursuant to the plan of reorganization, each share of the old preferred stock was to be replaced with one share of the new preferred stock, eight shares of the new common stock, and a small cash payment. Accumulated earnings and profits of the reorganized company exceeded the cash to be paid.

The cash payments will make available to stockholders a portion of the accumulated earnings and profits of the reorganized company and thus will have the effect of a distribution of a taxable dividend. In accordance with the provisions of section 112(c)(2) of the Code, the payments are taxable as dividends. It does not follow, however, that the payments are identical with ordinary dividends (*Commissioner* v. *George O. Kolb*, 100 Fed. (2d), 920), or, if identical, that they are subject to withholding of tax at the source under section 143(b) of the Code. That section does not require withholding of tax at the source with respect to all corporate distributions. Under the wording of the statute and the language of section 29.143–2 of Regulations 111, only fixed or determinable annual or periodical income is subject to withholding.

It is held that amounts distributed pursuant to a plan of reorganization, which amounts are taxable as dividends by reason of section 112(c)(2) of the Internal Revenue Code, do not constitute dividends or other fixed or determinable annual or periodical income within the

meaning of section 143(b) of the Code, and such amounts are not subject to withholding of tax at the source when distributed to nonresident alien stockholders. (See generally L. O. 1024, C. B. 2, 189 (1920), and G. C. M. 21575, C. B. 1939–2, 172.)

SECTION 710.—IMPOSITION OF TAX.

REGULATIONS 112, SECTION 35.710–5: Deferment of payment of tax in case of base period or invested capital abnormality.

INTERNAL REVENUE CODE.

Regulations 112 amended. (See T. D. 5490, page 16.)

SECTION 780.—POST-WAR REFUND OF EXCESS PROFITS TAX.

REGULATIONS 112, SECTION 35.780–1: Post-war refund of excess profits tax.
(Also Section 30.780–1, Regulations 109.)

INTERNAL REVENUE CODE.

Regulations 109 and 112 amended. (See T. D. 5490, page 16.)

SECTION 781.—SPECIAL RULES FOR APPLICATION OF SECTION 780.

REGULATIONS 112, SECTION 35.781–1: Special rules for application of section 780.
(Also Section 30.781–1, Regulations 109.)

INTERNAL REVENUE CODE.

Regulations 109 and 112 amended. (See T. D. 5490, page 16.)

SECTION 783.—CREDIT FOR DEBT RETIREMENT.

REGULATIONS 112, SECTION 35.783–1: Credit for debt retirement.

INTERNAL REVENUE CODE.

Regulations 112 amended. (See T. D. 5490, page 16.)

REGULATIONS 112, SECTION 35.783–2: Election to take credit for debt retirement for taxable years beginning after September 1, 1942, and ending before February 25, 1944.

INTERNAL REVENUE CODE.

Regulations 112 amended. (See T. D. 5490, page 16.)

REGULATIONS 112, SECTION 35.783–3: Credit for debt retirement in case of certain successions.

INTERNAL REVENUE CODE.

Regulations 112 amended. (See T. D. 5490, below.)

SECTION 784.—TEN PER CENTUM CREDIT AGAINST EXCESS PROFITS TAX.

REGULATIONS 112, SECTION 35.784–1: Ten per cent credit against excess profits tax. 1946–3–12230
T. D. 5490
(Also Section 710, Section 35.710–5, Regulations 112; Section 780, Section 35.780–1, Regulations 112, Section 30.780–1, Regulations 109; Section 781, Section 35.781–1, Regulations 112, Section 30.781–1, Regulations 109; Section 783, Sections 35.783–1, 35.783–2, and 35.783–3, Regulations 112.)

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 35 AND PART 30.

Regulations 112 and 109 amended to conform to section 3 of the Tax Adjustment Act of 1945, relating to changes in provisions with respect to post-war refund of excess-profits tax.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

REGULATIONS 112.

In order to conform Regulations 112 [Part 35, Title 26, Code of Federal Regulations, Cum. Sup.] to section 3 of the Tax Adjustment Act of 1945 (Public Law 172, Seventy-ninth Congress), approved July 31, 1945, such regulations are amended as follows:

PARAGRAPH 1. Section 35.710–5, as amended by Treasury Decision 5393, approved July 21, 1944 [C. B. 1944, 415], is further amended as follows:

(A) By inserting in the first sentence of the second paragraph immediately following the word "retirement": "or the 10 per cent credit under section 784."

(B) By amending the last two sentences of the third paragraph to read as follows:

In such case the tax deferment claimed under section 710(a)(5) and this section shall be denied and appropriate adjustment shall be made in the amount of tax otherwise shown by the taxpayer to be payable. For the purposes of section 271 (made applicable to Subchapter E of Chapter 2 by section 729) relating to the definition of deficiency, the amount of tax shown by the taxpayer to be payable so adjusted shall be considered the amount of tax shown on the return.

PAR. 2. There is inserted immediately preceding section 35.780–1 the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

(a) The first sentence of section 780(a) of the Internal Revenue Code is amended by striking out the words "the date of cessation of hostilities in the present war" and substituting in lieu thereof the following: "December 31, 1943".

(b) Section 780(b) of the Internal Revenue Code is amended by striking out the words "three months before the date of maturity of bonds for such year under subsection (c)" and inserting in lieu thereof the following: "July 1, 1945".

(c) Section 780(c) of the Internal Revenue Code is amended (1) by inserting in the last sentence after the words "to which this section applies" the following: "shall be payable at the option of the owner on or after January 1, 1946, and", and (2) by striking out the last two lines from the table at the end thereof.

* * * * * * *

PAR. 3. Section 35.780–1(*a*), as amended by Treasury Decision 5442, approved March 2, 1945 [I. R. B. 1945–6, 18], is further amended by striking out the second sentence and inserting in lieu thereof:

The taxable years so specified include all taxable years under these regulations which begin before January 1, 1944.

PAR. 4. There is inserted immediately preceding section 35.781–1 the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

* * * * * * *

(d) Section 781(a) of the Internal Revenue Code is amended by striking out the words "three months before the date of maturity of the bonds for such year" and inserting in lieu thereof the following: "July 1, 1945".

(e) The last sentence of section 781(b) of the Internal Revenue Code is amended by striking out the words "the time of the maturity of bonds issued with respect to such taxable year" and substituting in lieu thereof the following: "January 1, 1946".

(f) Section 781(c) of the Internal Revenue Code is amended to read as follows:

"(c) TAX PAYMENTS AFTER CUT-OFF DATE.—In the case of a payment of the tax imposed by this subchapter shown on the return for any taxable year for which a credit is provided in section 780(a), or the payment of a deficiency in respect of such tax for any such taxable year, on or after July 1, 1945, the amount of the credit under section 780(a) for such taxable year attributable to such payment shall be paid the taxpayer in cash. No interest for the period after December 31, 1945, shall be assessed or collected on that portion of the tax or deficiency so paid equal to the credit under section 780(a) attributable to such payment. If after January 1, 1946, there is any credit under section 780(a) remaining in favor of the taxpayer attributable to any taxable year for which a credit is provided in section 780(a), such remainder shall be paid to the taxpayer in cash. No amount of any payment made under this subsection to a taxpayer shall be included in gross income."

* * * * * * *

PAR. 5. Section 35.781–1, as amended by Treasury Decision 5442, is further amended as follows:

(A) By striking out section 35.781–1(*a*) and inserting in lieu thereof the following:

(*a*) *Deficiencies; refunds and credits of overpayments; and payments of certain post-war credits in cash.*—In case a deficiency is paid by the taxpayer, or an overpayment is refunded or credited to the taxpayer, for any taxable year to which section 780(a) applies, appropriate adjustments will be made in the post-war credit account of the taxpayer. In such case, whenever the amount of bonds should be increased or reduced, the Commissioner of Internal Revenue shall certify the status of the account to the Secretary in order that appropriate adjustments may be made in the amount of bonds. If the refund or credit of an overpayment was made on or before February 25, 1944 (the date of the enactment of the Revenue Act of 1943), the adjustment of the post-war credit or bonds of the taxpayer shall be made in accordance with section 781(b) in force prior to such date. If the refund or credit of an overpayment is made after February 25, 1944, such adjustment or, in an appropriate case, the reduction in the amount of the refund or credit of the overpayment of the tax, shall be made in accordance with section 781(b), as amended. Collection from a taxpayer under section 781(b) in force prior to February 25, 1944, of the amount by which charges (arising by reason of a refund or credit of an overpayment) exceed the amount of the post-war credit of the taxpayer shall be made by the Commissioner of Internal Revenue.

In the case of a payment of the excess profits tax shown on the return for a taxable year to which section 780(a) applies, or the payment of a deficiency in respect of the tax for any such taxable year, on or after July 1, 1945, the post-war credit attributable to such payment will not be available for the purchase of bonds, but instead the amount of such post-war credit will be paid to the taxpayer in cash. No interest for the period after December 31, 1945, shall be assessed or collected on that portion of the excess profits tax or deficiency in respect of such tax equal to the amount of the credit under section 780(a) attributable to the payment of such tax or deficiency. The amount of any post-war credit remaining in favor of the taxpayer after January 1, 1946, shall be paid to the taxpayer in cash. Any payment to a taxpayer under section 781(c) of amounts of any post-war credit shall be made by the Commissioner of Internal Revenue. No interest will be allowed or paid upon any payment to a taxpayer under section 781(c).

For provisions relating to reduction of the post-war credit on account of the allowance of a credit for debt retirement, see section 783(c) and section 35.783–1(*c*).

No income is realized by reason of the receipt by a taxpayer of any payment under section 781(c). Nor is any income realized by a successor by reason of his receipt of any such payment, if, under the provisions of section 113, the outstanding post-war credit with respect to which the payment is made had, for the purpose of determining gain or loss from a sale or exchange, the same basis in the hands of the successor as it would have had in the hands of the taxpayer. Otherwise, income may be realized by the successor from the receipt of such a payment.

(B) By striking out " or 85½ per cent, whichever is applicable " in the third sentence of section 35.781–1(*b*) and inserting in lieu thereof:

or, in the case of a taxable year beginning in 1943 and ending in 1944, the amount of excess profits tax which would be payable if in the computation under section 710(a)(6)(A) the excess profits tax rate were 81 per cent and in the computation under section 710(a)(6)(B) the excess profits tax rate were 85½ per cent

(C) By striking out subparagraph (4) of section 35.781–1(*b*).

(D) By striking out examples (5) and (6) in section 35.781–1(*b*).

PAR. 6. There is inserted immediately preceding section 35.783–1 the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

* * * * * * *

(g) Section 783 of the Internal Revenue Code is amended by inserting at the end thereof the following new subsection:

"(e) TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1943.—The provisions of this section shall not apply to taxable years beginning after December 31, 1943."

* * * * * * *

PAR. 7. Section 35.783–1, as amended by Treasury Decision 5442, is further amended as follows:

(A) By inserting at the end of section 35.783–1(*a*) the following:

For provisions making section 783 and the regulations prescribed thereunder inapplicable to taxable years beginning after December 31, 1943, see section 783(e) and section 35.783–1(*e*).

(B) By striking out example (3) in section 35.783–1(*b*) and inserting in lieu thereof the following:

Example (3). The excess profits tax imposed upon the W Corporation for the calendar year 1942 is $500,000, and for the calendar year 1943 is $300,000. The amounts paid by the corporation in repayment of indebtedness throughout the year 1942 total $25,000, and throughout the year 1943 total $150,000. The outstanding indebtedness of the corporation during the years 1942 and 1943 is as follows:

	Paid.	Borrowed.	Total indebtedness.
January 1, 1942			$200,000
September 1			200,000
October 15	$25,000		175,000
December 5		$50,000	225,000
December 31			225,000
Total paid	25,000		
January 1, 1943			225,000
March 15		75,000	300,000
November 10	150,000		150,000
December 31			150,000
Total paid	150,000		

The credit allowable for debt retirement for 1942 is zero, computed as follows:

40 per cent of $25,000, the total repaid in 1942 (see section 783(a) and section 35.783–1(*a*)) $10,000

But the credit for debt retirement for 1942 may not exceed whichever of the following amounts is the lesser (see section 783(b) (1) and (3) and section 35.783–1(*b*)(2)):

10 per cent of $500,000 (amount of tax imposed) $50,000
40 per cent of zero (amount by which indebtedness September 1, 1942, $200,000, exceeds indebtedness at close of taxable year 1942, $225,000) ..... zero

The credit allowable for debt retirement for 1943 is $20,000, computed as follows:

40 per cent of $150,000, the total repaid in 1943 (see section 783(a) and section 35.783–1(*a*)) $60,000

But the credit for debt retirement for 1943 may not exceed whichever of the following amounts is the lesser (see section 783(b) (1) and (2) and section 35.783–1(*b*)(3)):

10 per cent of $300,000 (amount of tax imposed)	$30,000
40 per cent of $50,000 (amount by which amount of indebtedness September 1, 1942, $200,000, or smallest amount of indebtedness at close of any preceding taxable year ending after September 1, 1942 (December 31, 1942), $225,000, whichever amount ($200,000 or $225,000) is the lesser, $200,000, exceeds amount of indebtedness at close of taxable year (December 31, 1943), $150,000	20,000

(C) By inserting immediately after section 35.783–1(*d*) the following:

(*e*) *Taxable years beginning after December 31, 1943.*—Neither the provisions of section 783 nor the provisions of section 35.783–1, 35.783–2, or 35.783–3 apply to taxable years beginning after December 31, 1943.

PAR. 8. Section 35.783–2(*a*), as amended by Treasury Decision 5442, is further amended by inserting at the end of the second paragraph thereof the following:

For provisions making section 783 and the regulations prescribed thereunder inapplicable to taxable years beginning after December 31, 1943, see section 783(e) and section 35.783–1(*e*).

PAR. 9. Section 35.783–3, added by Treasury Decision 5442, is amended as follows:

(A) By inserting at the end of section 35.783–3(*a*) the following:

For provisions making section 783 and the regulations prescribed thereunder inapplicable to taxable years beginning after December 31, 1943, see section 783(e) and section 35.783–1(*e*).

(B) By striking out the fourth sentence of section 35.783–3(*c*)(2) and inserting in lieu thereof the following:

For example, if a corporation is organized on September 30, 1943, and reports its income on the basis of a taxable year ending December 31, 1943, the close of any preceding taxable year shall be deemed to be December 31.

(C) By striking out examples (1) and (2) in section 35.783–3(*c*)(3) and inserting in lieu thereof the following:

Example (1). On September 30, 1943, the X Corporation merged into the Y Corporation, and the Y Corporation as a part of the merger assumed the outstanding indebtedness of the X Corporation in the amount of $100,000. The excess profits tax imposed upon the X Corporation for the taxable period of nine months ended September 30, 1943, is $400,000. The amounts paid by the X Corporation in repayment of indebtedness in 1943 total $90,000. The outstanding indebtedness of the X Corporation was as follows:

	Paid.	Borrowed.	Total indebtedness.
January 1, 1942			$200,000
September 1			200,000
December 5	$25,000		175,000
December 31			175,000
January 1, 1943			175,000
March 15		$15,000	190,000
June 30	90,000		100,000
September 30 (before merger)			100,000
September 30 (after merger)			[1] 0
Total paid	90,000		

[1] $100,000 assumed by Y Corporation in the merger ceases to be indebtedness of X Corporation.

The outstanding indebtedness of the X Corporation, as reconstructed in accordance with paragraph (c)(1) for purposes of the computation of the credit for debt retirement of such corporation for the taxable period ended September 30, 1943, is as follows:

	Total indebtedness.
September 1, 1942, $200,000 (indebtedness of the X Corporation September 1, 1942), *minus* $100,000 (indebtedness of X Corporation assumed by Y Corporation in the merger, $100,000, but not to exceed smallest amount of indebtedness of X Corporation September 1, 1942, or at close of any taxable year of X Corporation ending after September 1, 1942, and prior to the merger (September 1, 1942, $200,000; December 31, 1942, $175,000), $175,000)	$100,000
December 31, 1942, $175,000 (indebtedness of X Corporation December 31, 1942), *minus* $100,000 (indebtedness of X Corporation assumed by Y Corporation in the merger, after application of the limitation as shown above)	75,000

The credit for debt retirement allowable to the X Corporation for the taxable period ended September 30, 1943, is $30,000, computed as follows:

40 per cent of $90,000, the total repaid in 1943 (see section 783(a) and section 35.783–1(*a*))	$36,000

But the credit for debt retirement allowable to the X Corporation for the taxable period ended September 30, 1943, may not exceed whichever of the following amounts is the lesser (see section 783(b) (1) and (2) and sections 35.783–1(*b*)(3) and 35.783–3(*c*)(1)):

10 per cent of $400,000 (amount of tax imposed)	$40,000
40 per cent of $75,000 (amount by which amount of indebtedness September 1, 1942, as reconstructed, $100,000, or smallest amount of indebtedness, as reconstructed, at close of any preceding taxable year ending after September 1, 1942 (December 31, 1942), $75,000, whichever amount ($100,000 or $75,000) is the lesser, $75,000, exceeds amount of indebtedness at close of taxable year (September 30, 1943), zero)	30,000

The excess profits tax imposed upon the Y Corporation for the fiscal year ended November 30, 1943, is $500,000 and for the fiscal year ended November 30, 1944, is $600,000. The amounts paid by the Y Corporation in repayment of indebtedness throughout the fiscal year 1943 total $100,000 and throughout the fiscal year 1944 total $150,000. The outstanding indebtedness of the Y Corporation was as follows:

	Paid.	Borrowed.	Total indebtedness.
December 1, 1941			$150,000
September 1, 1942			150,000
October 15	$50,000		100,000
November 30			100,000
December 1, 1942			100,000
July 1, 1943	50,000		50,000
September 30 (before merger)			50,000
September 30 (after merger)			[1] 150,000
November 1	50,000		100,000
November 30			100,000
Total paid	100,000		
December 1, 1943			100,000
March 15, 1944		$50,000	150,000
September 1	100,000		50,000
November 15	50,000		0
November 30			0
Total paid	150,000		

[1] Includes $100,000 assumed in the merger.

ration in repayment of indebtedness in 1943 total $100,000. The outstanding indebtedness of the Z Corporation was as follows:

	Paid.	Borrowed.	Total indebtedness.
September 30, 1943			[1] $250,000
October 15		$50,000	300,000
December 1	$100,000		200,000
December 31			200,000
Total paid	100,000		

[1] Amount assumed in the consolidation.

The outstanding indebtedness of the Z Corporation, as reconstructed in accordance with paragraph (*c*)(2) for purposes of the computation of the credit for debt retirement of such corporation for the taxable period ended December 31, 1943, is as follows:

	Total indebtedness.
September 1, 1942, zero (indebtedness of Z Corporation September 1, 1942), *plus* $200,000 ($100,000 (indebtedness of X Corporation assumed by Z Corporation in the consolidation, $100,000, but not to exceed smallest amount of indebtedness of X Corporation September 1, 1942, or at close of any taxable year of X Corporation ending after September 1, 1942, and prior to the consolidation (September 1, 1942, $200,000; December 31, 1942, $175,000), $175,000), *plus* $100,000 (indebtedness of Y Corporation assumed by Z Corporation in the consolidation, $150,000, but not to exceed smallest amount of indebtedness of Y Corporation September 1, 1942, or at close of any taxable year of Y Corporation ending after September 1, 1942, and prior to the consolidation (September 1, 1942, $150,000; December 31, 1942, $100,000), $100,000))	$200,000
December 31, 1942, zero (indebtedness of Z Corporation December 31, 1942), *plus* $200,000 (aggregate indebtedness of X Corporation and Y Corporation assumed by Z Corporation in the consolidation, after application of the limitation as shown above)	200,000

The credit for debt retirement allowable to the Z Corporation for the taxable period ended December 31, 1943, is zero, computed as follows:

40 per cent of $100,000, the total repaid in 1943 (see section 783(a) and section 35.783–1(*a*))	$40,000

But the credit for debt retirement allowable to the Z Corporation for the taxable period ended December 31, 1943, may not exceed whichever of the following amounts is the lesser (see section 783(b) (1) and (2) and sections 35.783–1(*b*)(3) and 35.783–3(*c*)(2)):

10 per cent of $100,000 (amount of tax imposed)	$10,000
40 per cent of zero (amount by which amount of indebtedness September 1, 1942, as reconstructed, $200,000, or smallest amount of indebtedness, as reconstructed, at close of any preceding taxable year ending after September 1, 1942 (December 31, 1942), $200,000, whichever amount ($200,000 or $200,000) is the lesser, $200,000, exceeds amount of indebtedness at close of taxable year (December 31, 1943), $200,000)	zero

PAR. 10. There is inserted immediately preceding Subpart IV, as amended by Treasury Decision 5400, approved August 22, 1944 [C. B. 1944, 476], the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

* * * * * * *

(h) Subchapter E of Chapter 2 of the Internal Revenue Code is amended by adding at the end thereof the following new section:

"SEC. 784. TEN PER CENTUM CREDIT AGAINST EXCESS PROFITS TAX.

"(a) ALLOWANCE.—Against the tax imposed by this subchapter for any taxable year beginning after December 31, 1943, there shall be allowed as a credit an amount equal to 10 per centum of such tax.

"(b) SPECIAL INTEREST PROVISION.—No interest shall be allowed or paid upon any overpayment of tax resulting from the application of subsection (a) to a taxable year ending before December 31, 1945, unless, in the return made for such taxable year, the taxpayer claims a credit under such subsection."

SEC. 35.784–1. TEN PER CENT CREDIT AGAINST EXCESS PROFITS TAX.—(*a*) *General rule.*—Section 784(a) provides for the allowance of a credit against the excess profits tax imposed for certain taxable years. The taxable years for which such credit is allowable are those beginning after December 31, 1943. The credit under section 784 of a taxpayer for a taxable year is an amount equal to 10 per cent of the excess profits tax imposed upon the taxpayer for such year. For such purpose the tax imposed is the amount of tax determined under Subchapter E of Chapter 2 prior to (1) any credit under section 131, as made applicable by section 729, for tax paid or accrued to a foreign country or possession of the United States and (2) any adjustment under section 734 on account of position inconsistent with prior income tax liability. If it is determined, in the case of any taxpayer with respect to any taxable year for which a credit under section 784 is allowable, that constructive average base period net income should be used pursuant to section 722 in computing its tax, the tax imposed, for the purpose of the 10 per cent credit for such year, is the amount determined pursuant to the preceding sentence after the determination pursuant to such section. But in such case, pending the final determination of the tax pursuant to section 722, the tax imposed shall, for such purpose, be tentatively considered as an amount determined without regard to the determination under section 722, minus the amount, if any, by which the tax payable at the time prescribed for payment is reduced under section 710(a)(5) (relating to deferment of payment of tax in case of claim under section 722). For the purpose of the credit, the tax imposed does not include any interest, penalty, additional amount, or addition to the tax.

(*b*) *Special interest provision.*—Section 784(b) provides that no interest shall be allowed or paid upon that portion of any overpayment of excess profits tax for a taxable year ending before December 31, 1945, which is attributable to the allowance of a credit under section 784 unless, in the return made for such taxable year, the taxpayer claims a credit under such section. If, however, the taxpayer claims the benefit of a credit under section 784 in its return for a taxable year for which such credit is allowable, the restriction imposed by section 784(b) is not applicable. Hence, where such credit is claimed on the return, an understatement of the amount thereof will not deprive the taxpayer of interest on the resulting overpayment, if interest is otherwise allowable. The term "the return" as used in section 784(b) means the excess profits tax return, including an amended return, filed on or before the due date for such return, or, if the taxpayer fails to file an excess profits tax return on or before the due date, the first return filed thereafter by the taxpayer. The due date of a return is the date on or before which the return is required to be filed in accordance with the provisions of the Internal Revenue Code, or the last day of the period covered by an extension of time granted by the Commissioner or a collector.

REGULATIONS 109.

In order to conform Regulations 109 [Part 30, Title 26, Code of Federal Regulations, 1941 Sup.] to section 3 of the Tax Adjustment Act of 1945 (Public Law 172, Seventy-ninth Congress), approved July 31, 1945, such regulations are amended as follows:

PAR. 11. There is inserted immediately preceding section 30.780–1, as amended by Treasury Decision 5442, approved March 2, 1945, the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

(a) The first sentence of section 780(a) of the Internal Revenue Code is amended by striking out the words "the date of cessation of hostilities

in the present war" and substituting in lieu thereof the following: "December 31, 1943".

(b) Section 780(b) of the Internal Revenue Code is amended by striking out the words "three months before the date of maturity of bonds for such year under subsection (c)" and inserting in lieu thereof the following: "July 1, 1945".

(c) Section 780(c) of the Internal Revenue Code is amended (1) by inserting in the last sentence after the words "to which this section applies" the following: "shall be payable at the option of the owner on or after January 1 ,1946, and ", and (2) by striking out the last two lines from the table at the end thereof.

* * * * * * *

PAR. 12. Section 30.780–1(*a*), as amended by Treasury Decision 5442, is further amended by striking out the second sentence and inserting in lieu thereof:

The taxable years so specified are those ending after December 31, 1941, which begin before January 1, 1944.

PAR. 13. There is inserted immediately preceding section 30.781–1, as amended by Treasury Decision 5442, the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

* * * * * * *

(d) Section 781(a) of the Internal Revenue Code is amended by striking out the words "three months before the date of maturity of the bonds for such year" and inserting in lieu thereof the following: "July 1, 1945".

(e) The last sentence of section 781(b) of the Internal Revenue Code is amended by striking out the words "the time of the maturity of bonds issued with respect to such taxable year" and substituting in lieu thereof the following: "January 1, 1946".

(f) Section 781(c) of the Internal Revenue Code is amended to read as follows:

"(c) TAX PAYMENTS AFTER CUT-OFF DATE.—In the case of a payment of the tax imposed by this subchapter shown on the return for any taxable year for which a credit is provided in section 780(a), or the payment of a deficiency in respect of such tax for any such taxable year, on or after July 1, 1945, the amount of the credit under section 780(a) for such taxable year attributable to such payment shall be paid the taxpayer in cash. No interest for the period after December 31, 1945, shall be assessed or collected on that portion of the tax or deficiency so paid equal to the credit under section 780(a) attributable to such payment. If after January 1, 1946, there is any credit under section 780(a) remaining in favor of the taxpayer attributable to any taxable year for which a credit is provided in section 780(a), such remainder shall be paid to the taxpayer in cash. No amount of any payment made under this subsection to a taxpayer shall be included in gross income."

* * * * * * *

PAR. 14. Section 30.781–1(*a*), as amended by Treasury Decision 5442, is further amended to read as follows:

(*a*) *Deficiencies; refunds and credits of overpayments; and payments of certain post-war credits in cash.*—In case a deficiency is paid by the taxpayer, or an overpayment is refunded or credited to the taxpayer, for any taxable year to which section 780(a) applies, appropriate adjustments will be made in the post-war credit account of the taxpayer. In such case, whenever the amount of bonds should be increased or reduced, the Commissioner of Internal Revenue shall certify the status of the account to the Secretary in order that appropriate adjustments may be made in the amount of bonds. If the refund or credit of an overpayment was made on or before February 25, 1944 (the date of the enactment of the Revenue Act of 1943), the adjustment of the post-war credit or

bonds of the taxpayer shall be made in accordance with section 781(b) in force prior to such date. If the refund or credit of an overpayment is made after February 25, 1944, such adjustment or, in an appropriate case, the reduction in the amount of the refund or credit of the overpayment of the tax, shall be made in accordance with section 781(b), as amended. Collection from a taxpayer under section 781(b) in force prior to February 25, 1944, of the amount by which charges (arising by reason of a refund or credit of an overpayment) exceed the amount of the post-war credit of the taxpayer shall be made by the Commissioner of Internal Revenue.

In the case of a payment of the excess profits tax shown on the return for a taxable year to which section 780(a) applies, or the payment of a deficiency in respect of the tax for any such taxable year, on or after July 1, 1945, the post-war credit attributable to such payment will not be available for the purchase of bonds, but instead the amount of such post-war credit will be paid to the taxpayer in cash. No interest for the period after December 31, 1945, shall be assessed or collected on that portion of the excess profits tax or deficiency in respect of such tax equal to the amount of the credit under section 780(a) attributable to the payment of such tax or deficiency. The amount of any post-war credit remaining in favor of the taxpayer after January 1, 1946, shall be paid to the taxpayer in cash. Any payment to a taxpayer under section 781(c) of amounts of any post-war credit shall be made by the Commissioner of Internal Revenue. No interest will be allowed or paid upon any payment to a taxpayer under section 781(c).

For provisions relating to reduction of the post-war credit on account of the allowance of a credit for debt retirement, see section 783(c) and section 35.783–1(*c*) of Regulations 112.

No income is realized by reason of the receipt by a taxpayer of any payment under section 781(c). Nor is any income realized by a successor by reason of his receipt of any such payment, if, under the provisions of section 113, the outstanding post-war credit with respect to which the payment is made had, for the purpose of determining gain or loss from a sale or exchange, the same basis in the hands of the successor as it would have had in the hands of the taxpayer. Otherwise, income may be realized by the successor from the receipt of such a payment.

(This Treasury decision is issued under the authority contained in section 62 of the Internal Revenue Code (53 Stat., 32; 26 U. S. C., 1940 ed., 62), as made applicable by section 729(a) of the Internal Revenue Code (54 Stat., 989; 26 U. S. C., 1940 ed., 729(a)), and section 3 of the Tax Adjustment Act of 1945 (Public Law 172, Seventy-ninth Congress).)

WM. T. SHERWOOD,
Acting Commissioner of Internal Revenue.

Approved January 24, 1946.

JOSEPH J. O'CONNELL, JR.,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register January 25, 1946, 3.49 p. m.)

SECTION 1141.—COURTS OF REVIEW.

(Also Section 23(b), Section 19.23(b)–1; Section 115, Section 19.115–1.) 1946–3–12229 Ct. D. 1660

INCOME TAX—INTERNAL REVENUE CODE—DECISION OF SUPREME COURT.

1. GROSS INCOME—DEDUCTIONS—INTEREST—DISTRIBUTIONS BY CORPORATIONS—DIVIDENDS—FINALITY OF TAX COURT DECISION.

The conclusions of The Tax Court that certain payments which the taxpayer corporations made to holders of their corporate obligations were interest to creditors in the one case and dividends to stockholders in the other, the principal difference in the two cases being that in

the former the obligations bore 8 per cent noncumulative interest and in the latter cumulative interest fluctuating from 2 per cent to 10 per cent, are final under the rule of *Dobson* v. *Commissioner* (320 U. S., 489 [Ct. D. 1597, C. B. 1944, 56]). The words "interest" and "dividends" as used in the tax statutes are well understood, and The Tax Court is fitted to decide whether the annual payments under these corporate obligations are to be classified as interest or dividends.

2. DECISIONS AFFIRMED AND REVERSED.

Decision of the United States Circuit Court of Appeals, Seventh Circuit (146 Fed. (2d), 466), reversing decision of The Tax Court (1 T. C., 457), reversed; decision of the United States Circuit Court of Appeals, First Circuit (146 Fed. (2d), 809), affirming decision of The Tax Court (3 T. C., 95), affirmed.

SUPREME COURT OF THE UNITED STATES.

36. *The John Kelley Co., petitioner*, v. *Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

47. *Talbot Mills, petitioner*, v. *Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 7, 1946.]

OPINION.

Mr. Justice REED delivered the opinion of the Court.

These writs of certiorari were granted to examine the deductibility as interest of certain payments which the taxpayer corporations made to holders of their corporate obligations. Although the obligations of the two taxpayers had only one striking difference, the noncumulative in one and the cumulative quality in the other of the payments reserved under the characterization of interest, The Tax Court (formerly the Board of Tax Appeals, 56 Stat., 957; only its present name will be used herein) held that the payments under the former, the Kelley Company case, were interest and under the Talbot Mills were dividends. The circuit court of appeals reversed The Tax Court in the Kelley case and another circuit affirmed the Talbot Mills decision.[1] On account of the diversity of approach in The Tax Court and the reviewing courts, we granted certiorari.

In the Kelley case, a corporation, all of whose common and preferred stock was owned directly or as trustee by members of a family group, was reorganized by authorizing the issue of $250,000 income debenture bearer bonds, issued under a trust indenture, calling for 8 per cent interest, noncumulative. They were offered only to shareholders of the taxpayer but were assignable. The debentures were payable in 20 years, December 31, 1956, with payment of general interest conditioned upon the sufficiency of the net income to meet the obligation. The debenture holders had priority of payment over stockholders but were subordinated to all other creditors. The debentures were redeemable at the taxpayer's option and carried the usual acceleration provisions for specific defaults. The debenture holders had no right to participate in management. Other changes not material here were made in the corporate structure. Debentures were issued to the amount of $150,000 face value. The greater part, $114,648, was issued in exchange for the original preferred, with 6 per cent cumulative guaranteed dividends, at its retirement price and the balance sold to stockholders at par, which was eventually paid with sums obtained by the purchasers from common stock dividends. Common stock was owned in the same proportions by the same stockholders before and after the reorganization.

In the Talbot Mills case the taxpayer was a corporation which, prior to its recapitalization, had a capital stock of 5,000 shares of the par value of $100 or $500,000. All of the stock with the exception of some qualifying shares was held by members, through blood or marriage, of the Talbot family. In an effort to adjust the capital structure to the advantage of the taxpayer, the company was recapitalized just prior to the beginning of the fiscal year in question, by each stockholder surrendering four-fifths of his stock and taking in lieu thereof

[1] T. C., 457; 146 Fed. (2d), 466; certiorari granted, 325 U. S., —; Judicial Code, section 240(a). 3 T. C., 95; 146 Fed. (2d), 809; certiorari granted, 325 U. S., —; Judicial Code, section 240(a).

registered notes in aggregate face value equal to the aggregate par value of the stock retired. This amounted to an issue of $100,000 in notes to the then stockholders. These notes were dated October 2, 1939, and were payable to a specific payee or his assignees on December 1, 1964. They bore annual interest at a rate not to exceed 10 per cent nor less than 2 per cent, subject to a computation that took into consideration the net earnings of the corporation for the fiscal year ended last previous to the annual interest paying date. There was, therefore, a minimum amount of 2 per cent and a maximum of 10 per cent due annually and between these limits the interest payable varied in accordance with company earnings. The notes were transferable only by the owner's endorsement and the notation of the transfer by the company. The interest was cumulative and payment might be deferred until the note's maturity when "necessary by reason of the condition of the corporation." Dividends could not be paid until all then due interest on the notes was satisfied. The notes limited the corporation's right to mortgage its real assets. The notes could be subordinated by action of the board of directors to any obligation maturing not later than the maturity of the notes. For the fiscal year in question the maximum payment of 10 per cent was made on the notes.

The payments in question on corporate obligations were for the years in the Kelley case, 1937, 1938 and 1939; in the Talbot Mills case for the year 1940. Both corporations deducted the payments as interest from their reports of gross income under statutory sections and regulations set out in the footnote.[2] The applicable statutes and regulations were identical for all periods. The Commissioner asserted deficiencies because the payments were considered dividends and not interest.

There is not present in either situation the wholly useless temporary compliance with statutory literalness which this Court condemned as futile, as a matter of law, in *Gregory* v. *Helvering* (293 U. S. 465 [Ct. D. 911, C. B. XIV–1, 193 (1935)]). The demonstrated possibility of sales by the holders of the obligations to persons other than stockholders alone proves the differentiation. As material amounts of capital were invested in stock, we need not consider the effect of extreme situations such as nominal stock investments and an obviously excessive debt structure.

From the foregoing statements of facts, it appears that the characteristics of all the obligations in question and the surrounding circumstances were of such a nature that it is reasonably possible for determiners to reach the conclusion that the secured annual payments were interest to creditors in one case and dividends to stockholders in the other case. In the Kelley case there were sales of the debentures as well as exchanges of preferred stock for debentures, a promise to pay a certain annual amount, if earned, a priority for the debentures over common stock, the debentures were assignable without regard to any transfer of stock, and a definite maturity date in the reasonable future. These indicia of indebtedness support The Tax Court conclusion that the annual payments were interest on indebtedness. On the other hand, in the Talbot Mills case, The Tax Court found the factors there present of fluctuating annual payments with a 2 per cent minimum, the limitation of the issue of notes to stockholders in exchange only for stock, to be characteristics which distinguish the Talbot Mills notes from the Kelley Company debentures. Upon an appraisal of all the facts, The Tax Court reached the conclusion that the annual payments by Talbot Mills were in reality dividends and not interest.

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[2] Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * *

(b) INTEREST.—All interest paid or accrued within the taxable year on indebtedness, * * *.

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) DEFINITION OF DIVIDEND.—The term "dividend" when used in this chapter (except in section 203(a)(3) and section 207(c)(1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year * * *.

Treasury Regulations 103.

SEC. 19.23(b)–1. INTEREST.—Interest paid or accrued within the year on indebtedness may be deducted from gross income, * * *.

* * * * * * *

So-called interest on preferred stock, which is in reality a dividend thereon, can not be deducted in computing net income. * * *

(See Revenue Acts of 1936 and 1938, 49 Stat., 1648, 1659, 52 Stat., 447, 460, and Treasury Regulations 94, article 23(b)–1, and 101, article 23(b)–1.)

EMPLOYMENT TAXES.

INTERNAL REVENUE CODE.

CHAPTER 9, SUBCHAPTER C.—FEDERAL UNEMPLOYMENT TAX ACT.

SECTION 1607: Definitions. 1946–3–12232
REGULATIONS 107, SECTION 403.204: Who are employees. Mim. 5967
(Also Social Security Act, Section 907; Regulations 90, Article 205.)

Status for Federal employment tax purposes of corporate officers who perform no services or only nominal or minor services and who receive no compensation.

Mimeograph 5723 revoked and Mimeograph 4880 [C. B. 1939–1 (Part 1), 312] modified.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington 25, D. C., January 4, 1946.

Collectors of Internal Revenue and Others Concerned:

1. It has been the position of the Bureau heretofore that officers of corporations and of organizations taxable as corporations who perform no services and receive no compensation are to be counted nevertheless as employees for purposes of the tax imposed by Title IX of the Social Security Act and by the Federal Unemployment Tax Act on employers of eight or more. (Mim. 5723 dated June 27, 1944.) This position was based on the provisions of section 1101(a)(6) of the Social Security Act and section 1607(i) of the Federal Unemployment Tax Act and has been supported by the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Nicholas* v. *The Richlow Manufacturing Co.* (126 Fed. (2d), 16). The foregoing provisions of the respective Acts state that "The term 'employee' includes an officer of a corporation," and the court considered this language a sufficient basis for holding the officer involved in the case before it to have been an employee for purposes of the Social Security Act, without applying the usual tests of the employer-employee relationship. Several court decisions involving the Bureau's position on this subject subsequently have been handed down and have resulted in reconsideration of that position.

CASE OF DEECY PRODUCTS CO. V. WELCH.

2. In *Deecy Products Co.* v. *Welch* (C. C. A. 1, 124 Fed. (2d), 592), the court held, in effect, that a corporate officer is not an employee unless he meets the tests determinative of the ordinary employment relationship. This case involved the status of an individual who, if counted as an employee, rendered the company liable to tax for the calendar year 1936 under Title IX of the Social Security Act as an

employer of eight or more. The individual in question did the necessary legal work when the corporation was organized in 1923 under the laws of Massachusetts, has been its attorney ever since and in that capacity receives compensation. At the time of organization he was elected statutory clerk, an office required under the laws of the State, and held that office until 1937. As clerk he prepared the minutes of meetings and signed them. According to his testimony no annual meetings were held during some years but in most years the annual meeting of stockholders was held followed by the annual meeting of directors, both of which he attended, prepared the minutes, and signed them. During 1936 the total time expended by him in attending the meetings was a little over half an hour and dictation of the minutes required five minutes, these services comprising his total duties and services as clerk during the calendar year. No charge was made for his services as clerk, these being incidental to his duties as attorney for the corporation. Under the by-laws of the corporation the clerk is required to attend meetings of the stockholders and of the directors; to record upon the corporate book of records the proceedings of the respective meetings; to notify the stockholders and directors of their respective meetings, in accordance with the by-laws; and to perform such other duties as the directors shall from time to time prescribe.

3. Although the court disagreed with the Government's contention that the clerk, as an officer, was an employee solely because of the provisions of section 1101(a)(6) of the Social Security Act, the view was expressed, in effect, that nevertheless those provisions and the fact that he was an officer did not prevent him from being an employee within the meaning of the Act if he met the ordinary employment relationship tests. The court expressly stated its intention not to lay down any precise definition of such relationship, considering that the boundaries limiting the relationship appeared with sufficient clarity to permit it to determine the clerk's status. The undisputed facts and observations upon which the court based its conclusion that the clerk was an employee of the corporation are, in substance, that he performed services for the corporation; that the short period of time required in performing the services did not make it any less a rendering of services; that obviously, he was clerk during the entire year and if the directors or stockholders saw fit to meet more often, his work might have assumed greater proportions; that his serving as clerk was a necessary incident of the conduct of the corporation's business under the State laws; that his services as clerk can not be said to have been a gratuitous undertaking, being incidental to his work as the corporation's attorney, in which capacity he was paid; that while he may not have received any identifiable compensation as clerk he did not serve without consideration; that it is hard to think that he would have acted as clerk if he had not been the corporation's attorney; that from the standpoint of control and supervision, the clerk was subject to the board of directors and the board could direct him in the performance of the duties of his office and prescribe duties other than those specified in the by-laws; that it could not be said that he had no superiors in the corporation who could give him orders and the powers of the board were not nullified by the fact that he was the only one familiar with the legal procedure involved; and that here the clerk was subject to control as to the acts that constituted the execution of his agency.

4. The court in *Independent Petroleum Corporation* v. *Fly* (C. C. A. 5, 141 Fed. (2d), 189) held that an unpaid corporate officer, who performed only nominal services, is not to be counted as an employee. The officer involved in this case, the wife of the president, was elected secretary of the corporation and held that office throughout the year 1938. Upon its organization all shares of the corporation were issued to the president except one which for organizational purposes was issued, but not delivered, to his wife, the secretary. Recovery of the tax paid for the year 1938 under Title IX of the Social Security Act was sought by the corporation on the ground that the secretary was not an employee and without her it was not an employer of eight or more.

5. The corporation's secretary actually had no connection with the business and gave no attention to it; her husband, as president and general manager and sole owner, performed all the duties both of president and secretary, except that in 1938 she signed two tax returns and the minutes of an annual stockholders' meeting which had been prepared by her husband and were presented to her for signature at their home; she never performed any duty provided by the corporate by-laws except to sign the three instruments referred to above; she received no salary, wages, or other compensation, directly or indirectly, and did nothing else whatever for the corporation.

6. In concluding that the secretary was not to be counted as an employee the court expressed the view, in substance, that it was the Congressional intent in defining the term "employee" in the Social Security Act as including an officer of a corporation, to convey the meaning that officers were not to be excluded as employees if they were really employed by the corporation. The opinion of the court was that the wording of the definition did not necessarily mean that all officers of a corporation are employees but only such as worked for it in fact. Being of this opinion, the court determined that the secretary was not an individual in the employ of the corporation in any common or usual understanding of the words, having on only one or possibly two occasions done anything for it.

CASE OF NATIONAL WOODEN BOX ASSOCIATION V. UNITED STATES.

7. The Court of Claims, citing the two foregoing decisions and the decision in the case of *Magruder* v. *Yellow Cab Co. of D. C., Inc.* (141 Fed. (2d), 324), and stating that its conclusion was in accord with those decisions, also held in *National Wooden Box Association* v. *United States* (59 Fed. Sup., 118) that unpaid corporate officers, performing only nominal services, are not to be counted as employees for purposes of Title IX of the Social Security Act and the Federal Unemployment Tax Act. This case involved the status of the association's president, three vice presidents, and its treasurer, the contention being made by the association that none of these individuals was its employee and that without them it was not subject to tax under either Act as an employer of eight or more during the years 1936 to 1939, inclusive.

8. As found by the court the facts, so far as material here, are that not counting as employees its president, three vice presidents, or its

treasurer, the association did not have in excess of seven employees at any time during the years involved. The duties of the president of the association, a nonprofit unincorporated trade association of wooden box manufacturers, were to preside over the annual meetings and to write occasional letters. For this he received no remuneration and was entitled to none. In some instances where he made a trip to preside over a meeting, exclusively for that purpose, he was reimbursed his actual traveling expenses by the association and no more. The three vice presidents performed no duties, received no remuneration, and were entitled to none. Their official position was essentially an honorary one. The treasurer countersigned checks upon the association's bank of deposit. Under an arrangement with the bank such checks were to be valid only when countersigned either by the treasurer or by a previously designated member of the association's board of governors. Except for the countersigning of checks, the staff of employees at the association's office and place of business performed the actual work normally done by a treasurer. No remuneration was received by the treasurer from the association and he was entitled to none.

9. The business of the association actually was conducted by the secretary-manager, who was employed by the board of governors, worked under their supervision, and received a salary for his services. No office facilities, clerical assistants, or tools with which to perform any duties, were provided for the president, vice presidents, and treasurer. The latter officers, who were members of the board of governors, did not hire the employees, fix their wages, or discharge them, those duties being performed by the secretary-manager, nor did they determine the policies of the association, as the board of governors performed that function.

10. On the basis of the foregoing facts the court held that the association was not liable for the tax. It was the court's opinion, in substance, that for purposes of measuring the tax on total wages and counting employed individuals in determining whether the association was an employer of eight or more, it would seem that, in levying the tax on such an employer, Congress had in mind only individuals who were paid compensation. The observation was made in this connection that the tax being measured by total wages paid, a corporate officer who received no compensation did not increase the tax burden on a corporation subject to the tax and it would seem inconsistent to count such an officer in order to bring the corporation within the class subjected to the tax. It was further observed that there can be no enforceable contract of employment without an agreement to pay compensation in some form, as otherwise there would be no consideration for the contract; that unless the officers here involved received some sort of remuneration having a cash value, they were not employees as that word was evidently used in the Act; and it was agreed that they received no compensation having a cash value. With reference to the Government's contention that these officers must be included as employees in view of the provisions of section 1101(a)(6) of the Social Security Act, and the similar provisions of section 1607(i) of the Federal Unemployment Tax Act, that "The term 'employee' includes an officer of a corporation," the court took the view that this conclusion does not follow. It was pointed out that the word "employee" ordinarily denotes a subordinate person and is frequently construed to ex-

3. In the regulations applicable to the above-mentioned exceptions from "employment," the expression "officer or member of the crew of a vessel" is stated to include the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. The word "vessel" is stated to include every description of watercraft or other contrivance used as a means of transportation on water. (Article 206(3) of Regulations 90; article 10 of Regulations 91; and section 403.211 of Regulations 107.)

4. Certain types of vessels are equipped and operated primarily for use in dredging, driving piles, canning fish, or other activities in which some of the employees aboard the vessels perform only incidental services in connection with transportation or navigation. In the past the Bureau of Internal Revenue ordinarily regarded as officers or members of the crews of such vessels only those employees who had substantial duties in aid of navigation or transportation, as distinguished from those employees who had little or no connection with the operation and welfare of the craft as vessels or vehicles of transportation. The following published rulings were made on that basis:

S. S. T. 209, C. B. 1937–2, 428.

The employer owns floating pile drivers, barges and dredges, and employs individuals to serve thereon as dock builders, caisson builders, concrete mixers, carpenters, etc., in connection with the construction of piers and docks. The Bureau ruled that such employees are not members of the crew of such vessels.

S. S. T. 244, C. B. 1938–1, 433.

The employer owns a cannery which is located on board one of its vessels. A full crew is signed for the navigation of the vessel. Additional individuals such as superintendents, clerks, machinists, and others are employed in the operation of the cannery and the canning of fish therein. Such individuals are not required to sign the ship's articles but are subject to the authority of the master of the ship. The Bureau ruled that such individuals are not members of the crew of the vessel.

S. S. T. 283, C. B. 1938–1, 437.

An individual is employed as shipkeeper during the winter months when a vessel is frozen in. The crew is disbanded, and the shipkeeper is left in complete charge of the vessel, his duties being to protect it generally, shovel snow off the hatches, and care for the cargo. The Bureau ruled that the shipkeeper is not an officer or member of the crew.

5. Reconsideration of the published rulings referred to above results in the determination that they are erroneous when considered in the light of the decision in *Berwind-White Coal Mining Co.* v. *Rothensies* (137 Fed. (2d), 60), in which the United States Circuit Court of Appeals for the Third Circuit stated, in part, that "A crew is the comple-

ment necessarily aboard for the welfare and customary operation of a vessel."

6. The expression "officer or member of the crew of a vessel," as used for Federal employment tax purposes, includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, (*a*) whose primary duties require his service and continued presence on the vessel or its auxiliary equipment, (*b*) whose services there contribute in any way to the welfare and *customary operation* of the vessel, and (*c*) whose services are performed in the employ of the owner or operator of the vessel. The "customary operation" of a vessel includes any and every function which the vessel is equipped or intended to perform. The number of individuals serving on a vessel is immaterial; an individual serving alone may be an "officer or member of the crew" if his services otherwise meet the conditions stated above. Certain employees such as longshoremen, however, whose primary duties do not require their continued presence on vessels, may perform services on a vessel without becoming members of the crew.

7. The services described in S. S. T. 244 (cannery on vessel), and in S. S. T. 283 (shipkeeper), are performed by employees who, in serving on board and in contributing to the *customary operation* of the vessels, are officers or members of the crews of such vessels. In S. S. T. 209, however, the services of dock builders, caisson builders, concrete mixers, and carpenters are not described in sufficient detail for a determination whether or not such individuals are members of crews. The customary operations of the vessel, and the nature of services performed by employees in connection with such operations, are controlling factors for a determination of the status of such employees. A carpenter, for example, is not a member of the crew of a vessel if his primary duties require his presence on land or on structures which are a part of the land, and his presence on the vessel is casual. On the other hand, if the customary operations of a vessel require the continued presence of a carpenter on board the vessel, then such carpenter is a member of the crew if he otherwise meets the conditions stated in the first sentence of paragraph 6, above. Whether such an employee is an "officer or member of the crew of a vessel" must in doubtful cases be determined upon an examination of the particular facts of each case.

8. S. S. T. 209, S. S. T. 244, and S. S. T. 283 are revoked.

9. Inquiries relating to this mimeograph should refer to the number thereof and to the symbols A&C: RR.

WM. T. SHERWOOD,
Acting Commissioner.

TAXES UNDER SOCIAL SECURITY ACT.

TITLE IX.—TAX ON EMPLOYERS OF EIGHT OR MORE.

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Uncompensated officers. (See Mim. 5967, page 32.)

power of a decedent to terminate a trust so as to bring the trust estate within his gross estate for purposes of the transfer tax imposed by section 302(d) of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 71). The Court, finding it unnecessary to determine that question, disposed of the case upon another ground. The question is here again, this time inescapably, but with a further legislative history and a somewhat different setting of fact.

In 1936, immediately following the White decision, Congress revised section 302(d) by rewriting it into two separate paragraphs relating to "revocable transfers," one applying to transfers after June 22, 1936, the other to transfers on or prior to that date. These are now sections 811(d) (1) and (2) of the Internal Revenue Code, which are set forth in the margin.[1] For present purposes the difference claimed to be important consisted in changing the phrase "to alter, amend, or revoke" applying to transfers on or prior to June 22, 1936, so that in section 811(d)(1) it reads "to alter, amend, revoke, or terminate," as to transfers after that date.

However section 811(d)(2) governs the transfer in this case, since it was made in January, 1935, prior to the dividing date. And the question most mooted has been whether the change was one of substance or was only a clarifying amendment. Put differently, the principal issue is whether power to "alter, amend, or revoke" included power merely to terminate the interests created by the trust or required some further change.

The Tax Court and the Circuit Court of Appeals for the Fifth Circuit, one judge dissenting, have ruled that the change was substantial, not merely declaratory. (3 T. C., 571; 148 Fed. (2d), 740.) Accordingly they have held that no deficiency resulted from the taxpayer's failure to include the value of the trust estate created by the decedent Holmes in his gross estate for estate tax purposes. The Commissioner maintains the contrary view. Because of alleged conflict with decisions from other circuits,[2] certiorari was granted. (— U. S., —.)

We think The Tax Court and the court of appeals were in error in their view of the statute's effect.

The facts were stipulated. In so far as necessary to state, they are as follows. On January 20, 1935, by a single trust indenture Holmes created three several irrevocable trusts, one for each of three sons then aged 22, 19 and 14 years respectively. Each was given the beneficial interest in one-third of a common fund consisting of corporate stock later converted into other assets.[3] The three trusts were identical in terms. Holmes was named and acted as trustee until his death October 5, 1940.

Each trust was to continue for a period of 15 years, unless earlier terminated under power reserved to the grantor, or for a longer term on specified conditions summarized below. But the grantor reserved to himself during his lifetime the power to terminate any or all of the trusts and distribute the principal, with

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[1] SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(d) REVOCABLE TRANSFERS.—

(1) TRANSFERS AFTER JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

(2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph; (26 U. S. C., section 811.)

[2] *Mellon* v. *Driscoll* (117 Fed. (2d), 477 (C. C. A. 3); *Commissioner* v. *Hoffheimer's Estate* (149 Fed. (2d), 733 (C. C. A. 2)). See also the authorities cited in note 11 infra.

[3] The corporation which had issued the stock was liquidated and the corporate assets were transferred to the trust to replace the stock.

accumulated income, to the beneficiaries then entitled to receive it.[4] He retained no power to revest in himself or his estate any portion of the corpus or income.

Various provisions for disposititon over were made to cover contingencies created by the death of beneficiaries during continuance of the trust. Generally stated, the scheme was that the surviving issue of each son should take his share of the corpus, receiving it share and share alike, unconditionally if over 21; as beneficiaries until attaining that age, if under it. If a son should die without issue, his "share or trust" was to go "pro rata" to the other two sons, or their surviving issue *per stirpes;* if either other son should be dead without issue, the survivor or his issue was to take the whole; and if all the sons should be deceased without issue, whatever might remain in the trust estate was given to the grantor's wife, if living; if not, to her heirs at law. The trust was to terminate in any event upon the death of the last survivor of the three sons and the expiration of 21 years thereafter.

The trustee was given broad discretionary power to apply each beneficiary's share of the corpus for his maintenance, welfare, comfort or happiness, with a precatory suggestion of liberality.

The income was subject to spendthrift provisions and discretionary power of accumulation. If not accumulated, it was to be distributed to the beneficiary, preferably in monthly installments.

The principal contention is that the sum of the various provisions was to create or reserve to the decedent only a power to accelerate in time the enjoyment of the beneficial interests brought into being by the trusts; that these were vested interests; that no power was reserved to revest them or any of them in the donor or his estate or to change or alter them, or the terms of the gifts, in any manner other than by mere acceleration of enjoyment; and that the powers thus reserved are not sufficient to bring the trust estate, or any part of it, within the coverage of section 811(d)(2).[5]

This view presupposes two things. One is that termination of contingencies upon which enjoyment is dependent does not "change, alter, or revoke" enjoyment; the other, that the power "to alter, amend, or revoke" specified in section 811(d)(2) does not include a power to terminate contingencies which accelerate enjoyment, with the effect of making certain that the beneficiary taking will have it rather than others to whom it would or might inure if termination were longer deferred.

One difficulty with respondent's position is in its conception of "enjoyment." More than once recently we have emphasized that "enjoyment" or "enjoy," as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates. (Cf. *United States* v. *Pelzer*, 312 U. S., 399, 403 [Ct. D. 1495, C. B. 1941–1, 441]; *Fondren* v. *Commissioner*, 324 U. S., 18, 20 [Ct. D. 1627, I R. B. 1945–4, 18]; *Commissioner* v. *Disston*, 325 U. S., — [Ct. D. 1642, I. R. B. 1945–12, 28].)[6] In this sense it is clear that none of the sons here had a present right to immediate enjoyment of either income or principal (see *Commissioner* v. *Disston*, supra),

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[4] The power of termination was reserved by paragraph 11 of the indenture, as follows: "Grantor, during his lifetime, and my son or sons herein named, while acting as trustee hereunder, may, if deemed advisable by them as trustee, distribute to either of grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And grantor may, during his lifetime, if deemed advisable by him, and my son or sons herein named, while acting as trustee hereunder, may, if deemed advisable by them as trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination."

It seems questionable on the wording that the grantor's power of termination, like that of his sons, was limited by the clause "while acting as trustee hereunder." See note 13 and text.

[5] The taxpayer asserts that each son acquired, on execution of the indenture, "a fee simple title to one-third of the trust corpus and income," subject only to the trustee's power of management for 15 years at the most and to the son's living until this power should end. The reserved power of termination, it is said, applies only to the several contingencies which might affect the time of enjoyment, but not enjoyment itself.

[6] It is true that this case is not one involving the taxability of gifts of "future interests in property" as was true of the cases cited. It is likewise true that the laws relating to estate taxes and those relating to gift taxes are not completely reciprocal. (*Estate of Sanford* v. *Commissioner*, 308 U. S., 39 [Ct. D. 1426, C. B. 1939–2, 340]; *Smith* v. *Shaughnessy*, 318 U. S., 176 [Ct. D. 1575, C. B. 1943, 1144].) But there can be no difference in the meaning of the words "enjoyment" and "enjoy" as they are used in the pertinent statutory provisions respectively.

MISCELLANEOUS.

OLEOMARGARINE.

1946–3–12234
MS. 295

Schedule of oleomargarine produced and materials used during the month of December, 1945, as compared with December, 1944.

	December, 1945.	December, 1944.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 41, 101, 982	[2] 49, 413, 585
Total withdrawn tax-paid	41, 388, 957	50, 237, 466
Ingredient schedule of uncolored oleomargarine:		
Butter flavor	679	1, 933
Citric acid	133	243
Corn oil	615, 330	1, 011, 630
Cottonseed oil	14, 415, 335	21, 521, 723
Cottonseed stearine	655	45
Derivative of glycerine	84, 142	87, 356
Diacetyl	74	99
Estearine	8, 582	7, 798
Lecithin	49, 574	57, 881
Milk	6, 884, 845	8, 773, 283
Mononstearine	26, 139	35, 692
Neutral lard	233, 426	634, 173
Oleo oil	228, 129	562, 340
Oleo stearine	290, 792	215, 476
Oleo stock	13, 610	85, 366
Peanut oil	1, 290, 453	440, 119
Salt	1, 266, 685	1, 560, 966
Soda (benzoate of)	26, 252	29, 923
Soya bean oil	16, 331, 108	15, 612, 513
Soya bean stearine		2, 922
Tallow	1, 800	
Vitamin concentrate	9, 596	8, 364
Total	41, 777, 339	50, 649, 845
Total production of colored oleomargarine	[3] 3, 341, 287	3, 010, 200
Total withdrawn tax-paid	1, 618, 602	2, 169, 948
Ingredient schedule of colored oleomargarine:		
Butter flavor	27	23
Color	2, 500	5, 043
Corn oil	311	2, 368
Cottonseed oil	626, 717	826, 715
Derivative of glycerine	4, 776	2, 814
Diacetyl	12	4
Estearine	510	184
Lecithin	2, 333	1, 819
Milk	535, 570	517, 211
Monostearine	602	1, 645
Neutral lard	112, 566	52, 243
Oleo oil	306, 639	30, 645
Oleo stearine		1, 500
Oleo stock		15, 950
Peanut oil	12, 940	401
Salt	104, 454	98, 333
Soda (benzoate of)	1, 820	1, 585
Soya bean oil	1, 637, 966	1, 481, 371
Soya flakes		400
Vitamin concentrate	1, 082	350
Total	3, 350, 825	3, 040, 604

NOTE.—The figures for December, 1945, and December, 1944, are subject to revision until published in the Commissioner's annual report.

[1] Of the amount produced, 6,277 pounds were reworked.
[2] Of the amount produced, 9,727 pounds were reworked.
[3] Of the amount produced, 24 pounds were reworked.

CUMULATIVE INDEX.

BIWEEKLY BULLETINS 1946–1 TO 1946–3

The Internal Revenue Bulletin service for 1946 will consist of biweekly bulletins and semiannual cumulative bulletins.

The biweekly bulletins will contain the rulings and decisions to be made public and all Treasury Department decisions (known as Treasury decisions) pertaining to Internal Revenue matters. The semiannual cumulative bulletins will contain all rulings and decisions (including Treasury decisions) published during the previous 6 months.

The complete Bulletin service may be obtained, on a subscription basis, from the Superintendent of Documents, Government Printing Office, Washington 25, D. C., for $2.50 per year; foreign, $3.75. Single copies of the biweekly Bulletin, 10 cents each.

New subscribers and others desiring to obtain the 1919, 1920, and 1921 Income Tax Service may do so from the Superintendent of Documents at prices as follows: Digest of Income Tax Rulings No. 19 (containing digests of all rulings appearing in Cumulative Bulletins 1 to 5, inclusive), 50 cents per copy; Cumulative Bulletins Nos. 1 to 5, containing in full all rulings published since April, 1919, to and including December, 1921, as follows: No. 1, 30 cents; No. 2, 25 cents; No. 3, 30 cents; No. 4, 30 cents; No. 5, 25 cents.

Persons desiring to obtain Sales Tax Cumulative Bulletins for July–December, 1921, may procure them from the Superintendent of Documents at 5 cents per copy.

Persons desiring to obtain the Internal Revenue Bulletin service for the years 1922 to 1944, inclusive, may do so at prices as follows:

Year	Cumulative Bulletin.		Price (cents).
	First 6 months.	Second 6 months.	
1922	I–1	I–2	40, 30
1923	II–1	II–2	30, 40
1924	III–1	III–2	50, 50
1925	IV–1	IV–2	40, 35
1926	V–1	V–2	40, 30
1927	VI–1	VI–2	40, 40
1928	VII–1	VII–2	35, 50
1929	VIII–1	VIII–2	50, 55
1930	IX–1	IX–2	50, 50
1931	X–1	X–2	65, 30
1932	XI–1	XI–2	30, 55
1933	XII–1	XII–2	30, 50
1934	XIII–1	XIII–2	50, 60
1935	XIV–1	XIV–2	50, 50
1936	XV–1	XV–2	55, 45
1937	1937–1	1937–2	60, 50
1938	1938–1	1938–2	60, 50
1939	1939–1—	1939–2	60
	Part 1	----------	50
	[1] Part 2	----------	$1
1940	1940–1	1940–2	30, 60
1941	1941–1	1941–2	45, 60
1942	1942–1	1942–2	40, 60
1943	----------	----------	$1. 25
1944	----------	----------	$1. 50

[1] House, Senate, and conference reports on revenue bills from October 3, 1913, to Revenue Act of 1938, inclusive; and on amendments thereto.

Persons desiring to obtain the service in digest form may do so at prices as follows: Digest No. 13 (1922–1924), 60 cents; Digest No. 17 (1925), 25 cents; Digest No. 21 (1926), 15 cents; Digest No. 22 (1925–1927), 35 cents; and Digest A (income tax rulings only, April, 1919, to December, 1930, inclusive), $1.50.

All inquiries in regard to these publications and subscriptions should be sent to the Superintendent of Documents, Government Printing Office, Washington 25, D. C.

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